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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Morreon B. RUDE, Rodney H.S. KIM, Charles E. ANDREWS,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Congress intended the federal money laundering statute, 18 U.S.C. § 1956, to require a separate and distinct conduct as its proscribed activity from the conduct of an underlying, prior and predicate offense, or is one of the offenses of wire fraud and money laundering a lesser included offense of the other?

Whether convictions for wire fraud and money laundering, with both offenses being based upon the exact same conduct as their proscribed activity, constitute a prohibitive violation of the Double Jeopardy Clause and the Blockburger Rule?

Whether the federal wire fraud statute vests federal courts with broad discretion to go beyond the parameters established by this Court in determining when the statutorily required element of a scheme to defraud is actually complete, especially when there is no evidence of a "lulling scheme," or an "on-going scheme?"

Whether a conviction for money laundering, which is affirmed based upon an analysis of the mail fraud statute, constitutes a violation of the Due Process Clause by effectively amending the Superseding Indictment without notice?

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Morreon B. Rude, Rodney H.S. Kim and Charles E. Andrews respectfully petition for a writ of certiorari to review the judgment of the United States Court of appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of appeals are reported at 96 Daily Journal D.A.R. 8275 and 1996 WL 511473 (9th Cir. Wash.) (App., *infra*, A, B).

JURISDICTION

The Court of Appeals entered its judgment on July 10, 1996 (App., *infra*, A), and its amended judgment on September 10, 1996 (App., *infra* B). As part of its amended judgment, the Court of Appeals also entered its denial of the petition for rehearing and its rejection of the suggestion for rehearing *en banc* (App., *infra*, B). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(l), 2101(c), and Rule 20.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1343 provides, in relevant part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme ..."

18 U.S.C. § 1956(a)(2)(A) provides, in relevant part:

> "Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity; . . . "

18 U.S.C. § 1956(a)(1)(A)(i) provides, in relevant part:

> "Whoever, knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity; . . . "

STATEMENT

Petitioners were charged with five counts of wire fraud under 18 U.S.C. § 1343, five counts of money laundering under 18 U.S.C. § 1956(a)(2)(A), one count of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), and one count of conspiracy under 18 U.S.C. § 371, all by way of a Superseding Indictment issued on September 14, 1994 (App., *infra*, C). Petitioner, Charles Andrews was charged with two additional counts of perjury under 18 U.S.C. § 1623, and one additional count of perjury under 18 U.S.C. § 1001.

A. Material and Undisputed Facts

This case involves an alleged scheme to defraud investors, including Unity House, Inc., a Hawaii non-profit corporation, of $10 million for the purpose of prime bank note transactions.

On January 8, 1993, Unity House, Inc. and North Pacific Investments, Inc. executed a Private Participation Agreement and Limited Power of Attorney. (RT, A. Rutledge, Vol. II, pp.28-29). On January 19, 1993, Unity House, Inc. executed account documents with Credit Suisse Bank of Geneva, Switzerland further providing defendant Stafford Mew with a general power of attorney over Unity House's account. (RT, A. Rutledge, Vol. II, pp.35-37, 124-129), and pursuant thereto, wired the sum of $10 million from Hawaii to Credit Suisse. (RT, A. Rutledge, Vol. II, pp.20,36).

Numerous bank note transactions were unsuccessfully attempted by Mew and Jean-Pierre Collenot.[1] (*See, generally*, RT, Collenot, March 15, 1995). During one of the foregoing, unsuccessful transactions, Mew arranged a bank wire in the sum of $8.6 million from Credit Suisse to Anker Bank in Europe. (RT, Collenot, Mar. 15, 1995, pp.200, 203-204).

Between February 17, 1993 and April 19, 1993, Mew arranged five wires from Credit Suisse to Seafirst in Seattle, Washington totaling $10 million. (App., *infra*, C13). A portion of the $10 million was used for personal purposes, and a substantially major portion was invested into various stock trades. (App., *infra*, C7-11).

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[1] Although not named as a defendant in this case, Jean-Pierre Collenot was the person in Europe responsible for handling bank note transactions on behalf of North Pacific Investments, Inc.

On or about July 6, 1993, North pacific Investments arranged a wire in the sum of $650,000 from Seafirst Bank in Washington to Hawaii. (App., *infra*, C16).

B. Proceedings Below

Jury trial was held in the District Court for the Western District of Washington involving defendants Jack Gonzales, Stafford Mew, Morreon Rude and Rodney Kim, resulting in convictions of all defendants on all counts on March 21, 1995. Prior to the trial, petitioner Charles Andrews pled guilty to one count of perjury before the grand jury pursuant to a plea agreement. (App., *infra*, B9). Timely appeals to the Court of Appeals were taken by Mew, Rude, Kim and Andrews pursuant to Rule 4(b) of the Fed.R.App.P., invoking jurisdiction under 18 U.S.C. § 1291. The Court of Appeals issued its decision on July 10, 1996, affirming all convictions. (App., *infra*, A).

On or about August 2, 1996, petitioners filed their motion for hearing *en banc*, or in the alternative, a motion to reconsider the Court of Appeals' decision based upon a clear inconsistency with existing precedent in *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) which directly addressed two of the same federal statutes in this case, 18 U.S.C. § 1343 and 18 U.S.C. § 1956, under strikingly similar facts. (App., *infra*, D).

Petitioners' motion was also based upon an even more clear inconsistency with the Tenth Circuit's decision in *United States v. Johnson*, 971 F.2d 562, (10th Cir. 1992).

On September 10, 1996, the Court of Appeals issued an amended decision (App., *infra*, B), which included its order denying petitioners' motion for rehearing and rejecting the suggestion for rehearing *en banc*, without addressing the inconsistent decisions of either *Savage*, or *Johnson*, and without stating any reasons for its rejection and denial.

REASONS FOR GRANTING THE PETITION

This case provides a timely opportunity for this Court to provide definitive guidance in cases of wire fraud tied into charges of money laundering, which frequently result in unjustifiable, and overly lengthy, sentences due to the money laundering charges. Additionally, although this Court has rendered a number of decisions in the past establishing firm guidance on wire fraud and money laundering cases, and their relevant statutory bases, this case provides this Court with an opportunity to provide guidance on the scope of the money laundering statute beyond any of this Court's prior decisions. This Court has yet to provide clear guidance regarding Congress' intent in enacting the statute.

The decision below is erroneous under this Court's prior decisions, and the legislative history regarding the money laundering statutes, and also raises a substantial Constitutional question which cannot be resolved without review by this Court. Although drug-related money laundering cases abound in the lower courts, due to systemic reasons, few of the lower court decisions receive appellate review by this Court. Finally, based upon the unusual facts of this case, this Court now has the opportunity to provide clear guidance on money laundering cases, which do not involve drugs, and which has heretofore been unavailable to the lower courts except for legislative history.

I. THE COURT OF APPEALS' INTERPRETATION OF 18 U.S.C. §§ 1343 AND 1956 IS AN ABRUPT AND MARKED DEPARTURE FROM ITS OWN EXISTING PRECEDENT, CREATING A SPLIT OF AUTHORITY IN THE DISTRICT COURTS, AND IS CLEARLY IN CONFLICT WITH THE INTERPRETATIONS OF THE FIRST, SECOND AND TENTH CIRCUITS.

A. Prior to the decision below, and as recent as October 13, 1995, the Ninth Circuit enunciated its interpretation of 18 U.S.C. § 1956, in *Savage, supra.* In defining the money laundering statute, specifically 18 U.S.C. § 1956(a)(2)(B)(i), the *Savage* Court began its analysis by "construing § 1956 to determine what is meant by 'proceeds'", *Id.*, at 1441, and concluded that the money laundering statute requires its own offense conduct or activity, separate and apart from the underlying, predicate criminal activity. In analyzing the legislative history, the Court stated that "Congress considered money laundering to be *separate conduct occurring after completion of the underlying criminal offense.*" (emphasis added), *Id.*

The decision below is a sudden and direct departure from the *Savage* decision. The petitioners were charged with wire fraud in violation of 18 U.S.C. § 1343 in Counts I through V of the Superseding Indictment, each count consisting of one of the five bank wires from Credit Suisse to Seafirst. (App., *infra*, C13).

Petitioners were then charged with money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) in counts VI through X, each count consisting of one of the same five bank wires alleged in Counts I through V.

In this case, although Counts VI through X are based upon a different subsection than in the *Savage* case, the difference appears to be immaterial. Although the *Savage* subsection, § 1956(a)(2)(B)(i), contains the language "proceeds of some form of unlawful activity," which the subsection in Counts VI through X does not contain, both subsections require proof of a "specified unlawful activity." In fact, each major subsection of 18 U.S.C. § 1956 requires, *inter alia*, proof of a "specified unlawful activity."

Finally, the subsection in Counts VI through X in the decision below requires proof of an "intent to promote . . . specified unlawful activity," which results in the five wires in the money laundering counts "promoting" the same five wires in the wire fraud counts.

B. The decision below is also a sudden and direct departure from Ninth Circuit precedent on the interpretation of the wire fraud statute, 18 U.S.C. § 1343.

In *Savage, supra*, Savage argued that the transferred money involved in his case did not constitute proceeds of the "specified unlawful activity" because the mail and wire fraud were not complete until the money was transferred overseas and then back to the United States into his personal accounts. *Id.*, at 1442. The Court disagreed, holding that "Each act of mail and wire fraud was complete at the point at which Savage *or someone acting under his direction* ... wired the money in the United States. (emphasis added), *Id.* In further clarifying its decision, the Court stated:

> Similarly, the funds transferred in the § 1957 counts were criminally derived property *at the time they were deposited in accounts under Savage's control. The funds were clearly at Savage's disposal at the time of deposit*--the record indicates that the parties named on the accounts transferred the money at his request. *It is irrelevant that the accounts were not in Savage's name.* (emphasis added), *Id.*, at 1443.

In the decision below, the Court of Appeals acknowledged:

> Anthony Rutledge, the president of Unity House, and Mew signed a Limited Power of Attorney and a Private Participation Agreement, each prepared by Kim, authorizing the arrangement, whereunder NPI was given a general power of attorney in order to transfer funds out of the Credit Suisse account. (App., *infra*, B10)(*see, also*, p.3, *supra*).

Here, Petitioners contend what the *Savage* Court held, i.e., that the alleged scheme was complete when the initial $10 million transfer was made to Credit Suisse. As in *Savage*, Unity House wired the $10 million at Mew's direction. Unlike in *Savage*, however, Mew had *full control* over Unity House's account via the Limited and General Powers of Attorney. Additionally, Mew was the sole signatory on Unity House's account. (Gov. Ex. 302). Unlike Mew's control over the account, Savage's control over his agents' accounts was only through verbal or other communications with his agents, yet, the *Savage* Court deemed it sufficient to meet the statutory jurisdiction requirement. Finally, under the facts of this case as even acknowledged by the Court, Mew was actually imbued with more direct and active control over the $10 million and the account than even Unity House, once the funds were on deposit.

Contributing to the unusual nature of this case, the Court of Appeals was inexplicably silent regarding the Anker Bank wire. (See p.3, *supra*). Even accepting the Court of Appeals' rationale as a correct statement of prior Circuit precedent, the alleged scheme was complete no later than the $8.6 million wire arranged by Mew from Credit Suisse to NPI's account in Anker Bank in Europe, because it clearly resulted in "thus placing the funds outside of Unity House's account, outside of the scope of Unity House's authorization, and within their own control." (App., *infra*, B17). Accordingly, even based upon its own rationale, the decision is erroneous.

The danger created by the lower Court's sudden departure from Circuit precedent promises to fuel the disarray resulting from the district courts' attempts to grapple with the foregoing issues in handling indictments and cases which are characteristically complex in nature.

The potential and far-reaching effect of the conflict created by the decision below is even more enhanced because its sudden departure from existing precedent is in violation of Fed.R.App.P., Rule 35, having been rendered by a panel, rather than the Court sitting *en banc*. [*See, United States v. Lewis*, 991 F.2d 524, 526, n.1 (9th Cir. 1993)("a panel not sitting *en banc* may not overturn Ninth Circuit precedent)]. Any district court decision hereafter will simply side with *Savage*, or the decision below, depending on the preference of each district court. There is no realistic prospect for resolution of this problem without a decision by this Court.

C. The decision below also creates a direct conflict with the decisions of the First, Second and Tenth Circuits.

In *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, ___U.S. __, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992), the Tenth Circuit interpreted 18 U.S.C § 1956 pursuant to its legislative history.

> . . . Congress appears to have intended the money laundering statute to be *a separate crime distinct from the underlying offense that generated the money to be laundered.* The Senate report on § 1956 expresses the need for a federal criminal offense *aimed directly at the activity of laundering* the money gained from illegal activity. The Senate report on the money laundering bill makes plain that the bill was intended to create a 'new Federal offense against money laundering.' (emphasis added).

In concluding that "Congress intended money laundering and the 'specified unlawful activity' to be separate offenses separately punishable," the Tenth Circuit further stated that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime." (emphasis added) *Id.*, at 1214.

In *United States v. Johnson*, 971 F.2d 562, 568-569 (10th Cir. 1992), the Tenth Circuit made an even clearer statement of its interpretation of the statute by reversing the judgment of conviction on 28 counts involving 28 separate wire transfers, where those same wire transfers also constituted the underlying offense of wire fraud. Although the 28 counts were charged under § 1957, rather than § 1956, "Congressional concerns regarding money laundering is applicable to both § 1956 and to § 1957." *Savage, supra,* at 1442. Here, the lower Court reached a directly opposite result from *Johnson*, with five counts based on the identical factual circumstances as in *Johnson.*

The Second Circuit is even more direct in its interpretation of the statute, holding that "Section 1956 does not penalize the underlying activity from which the tainted money is derived." *United States v. Stavroulakis*, 952 F.2d 686, 691 (2nd Cir. 1992), *cert. denied,* __U.S.___, 112 S.Ct. 1982, 118 L.Ed.2d 580 (1992).

Similarly, the First Circuit interprets the legislative history of the statute as indicating that Congress intended "money laundering to be a separate crime distinct from the underlying offense that generated the money." *United States v. Leblanc*, 24 F.3d 340, 346 (1st Cir. 1994). Citing the Tenth Circuit in *Johnson, supra,* the First Circuit further held that "Congress aimed § 1956 'at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior "specified unlawful activity."'" *Id.*

Two months later, in *United States v. Pierro*, 32 F.3d 611, 620 (1st cir. 1994), the First Circuit reiterated its position.

> In our view, Congress meant this statute to address, among other things, conduct undertaken

> subsequent to, although in conjunction with, an underlying crime, rather than merely affording an alternative means of punishing the underlying crime itself. (emphasis added)

If the First, Second and Tenth Circuits are correct in their interpretations of the statute that Congress intended to create a separate offense, separately punishable from drug trafficking offenses, when the underlying predicate offense is not related to drug trafficking, it cannot be consistent with Congress's intent that the statute changes its meaning. Moreover, the decision below in affirming the convictions of wire fraud and money laundering based upon the same five wire transfers provided neither an analysis of Congress's intent in enacting the money laundering statute, nor an interpretation of the statute.

The decision below presents this Court with an important question of first impression which cannot be resolved without review by this Court. Certiorari should be granted.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS AND IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT.

This Court's decisions have consistently taught how the wire fraud and mail fraud statutes are to be interpreted in appropriate cases. Because the language in both statutes are identical, except for the use of mails in one, and the use of wires in the other, the wire fraud statute is read in light of the cases on mail fraud. *United States v. Manarite*, 44 F.3d 1407, 1412, n.5 (9th Cir. 1995). Despite this Court's teachings, cases involving wire fraud, mail fraud and money laundering are characteristically complex often compounded by separate forfeiture proceedings. The decision below has interpreted the wire fraud and money laundering statutes in a manner which finds no support in this Court's decisions. Moreover, the Court of appeals erroneously disregards Congress's intent reflected in the legislative history of the money laundering statute.

A. The decision below raises serious concerns of double jeopardy infringements. In *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), this Court first established the assumption that Congress ordinarily does not intend to punish the same offense under two different statutes. Although the double jeopardy question was not specifically addressed in the original appeal briefs, petitioners are properly before this Court with that question. *Launius v. United States*, 575 F.2d 770, 772 (1978) [citing *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 52 S.Ct. 1019, 82 L.Ed. 1461 (1938)].

Notwithstanding the foregoing, petitioners did raise the issue of multiplicity of offenses in their original appeal briefs (*see* Rude Op. Brief, pp. 30-32), to which the Court of Appeals merely stated:

> We find no merit to this claim. An indictment is multiplicitous if it charges a single offense in several counts. (citation omitted) It is well established, however, that money laundering and wire fraud are separate offenses. (App., *infra*, B20).

The Court neither responded to, nor resolved the real issue presented. Since the Court provided no further reasons or basis for its decision, there is no way to apply the Court's decision to the real problem, that of the same conduct being punished twice, in a sensible manner. Actually, the multiplicity of offense issue leads directly to the heart of the Double Jeopardy Clause which states, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

This Court has defined the Fifth Amendment guarantee against double jeopardy to consist of "three separate constitutional protections." *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, 665 (1969).

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

In order to decisively analyze the double jeopardy question, the Tenth Circuit set forth a two-step analysis based upon this Court's decision in *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 746 (1985). *Edgmon, supra* at 1213.

The first step is for the Court to determine whether Congress "intended each statutory violation to be a separate offense and whether one violation was intended to be a lesser included offense of the other." *Id.* The Blockburger test is an aid to this first step "to help determine legislative intent." *Id.* "If Congress did not intend the statutory violations to be separately punishable offenses, the analysis ends." *Id.* Since "Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense," *Id.*, at 1213, the alleged wire fraud being the "specified unlawful activity" required in the money laundering statute is clearly not a lesser included offense of the money laundering statute. Reaching this conclusion, the analysis must then proceed to the second step.

"In the second step, the Court must determine whether separate prosecutions or punishments for the offenses violate the Due Process Clause," *Id.*, and "whether prosecution for both offenses violates the Double Jeopardy Clause." *Id.*, at 1214. In the usual case, where the money laundering statute is involved, double jeopardy questions would normally not arise. As even the Court of Appeals below noted, "money laundering and wire fraud are separate offenses." In this case, however, the facts are peculiarly relevant. When presented with the identical problem in 28 counts of money laundering, the Tenth Circuit reversed the convictions on all 28 counts. *Johnson, supra*, at 569-570. In other words, mere relabelling of the same conduct appears to be inconsistent with Congress's intent in enacting the statute.

The critical inquiry in the second step of the analysis is whether the convictions for the wire fraud counts (I-V), and the money laundering counts (VI-X), both of which involve the identical conduct, violate the Double Jeopardy Clause. Applying the Blockburger test as a "rule of statutory construction," *Garrett*, 471 U.S. at 778-779, it appears clear that Congress intended the offenses of wire fraud and money laundering to be separate and distinct offenses, separately punishable. However, it appears equally clear, from a review of the legislative history of the money laundering statute that Congress did not intend to punish the same conduct as wire fraud and money laundering. To that effect, this Court has stated:

> We have recently indicated that the Blockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.
>
> . . . . .
>
> Insofar as the question is one of legislative intent, the Blockburger presumption must of course yield to a plainly expressed contrary view of the part of Congress. *Id.* at 779.

As noted earlier, the Court below, although stating no reasons, found "no merit" to petitioners' multiplicitous claims. Yet, in a more recent case involving similar issues, decided on September 23, 1996, the Ninth Circuit found that the defendant's double jeopardy rights had been violated. *United States v. Alerta*, 96 Daily Op. Serv. 7086, 96 Daily Journal D.A.R. 11,597, 1996 WL 535047 (9th Cir. 1996). In *Alerta*, multiple charges were brought addressing two different objects of the criminal conspiracy. Applying the Blockburger test and this Court's teachings, the *Alerta* Court found that although there were multiple objects of the criminal conspiracy, there was only one agreement. The Court also finding that multiple "charges against Alerta, which related to the same unitary agreement, were multiplicitous," *Id.*, 1996 WL 535047, at 9, concluded that "Alerta cannot be subjected to multiple punishment on multiplicitous charges." *Id.* The conclusion by the *Alerta* Court is reached even easier in this case, since the multiple charges are clearly alleged on the exact same five wires.

A review of this Court's decisions, combined with the First, Second and Tenth Circuits' interpretations of the money laundering statutes lead to the inescapable conclusion that the decision below violates the petitioners' double jeopardy rights in its affirmation of the "multiple punishments for the same offense." More pointed is this Court's teaching from an earlier case quoted in *Pearce, supra*, at 23 L.Ed.2d 665:

> 'And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed, on the same facts, for the same statutory offense.'

Especially in light of this important Constitutional question, the Court should grant certiorari for review.

B. At least since 1944, this Court has taught that the wire fraud statute "does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud." *Kann v. United States,* 323 U.S. 88, 95, ____U.S. _____, 89 L.Ed. 88 (1944). Regarding the wire fraud counts, the Court below stated:

> Regarding the transfers from the Credit Suisse account to Seafirst, the defendants overlook the fact that their fraud was not complete until the $10 million deposited in Credit Suisse (in Unity House's account) was within their complete control. Unity House was falsely promised that its

> money would remain in the Credit Suisse account. Although effecting a transfer to Credit Suisse was a step in the scheme, the final steps did not occur until defendants effected transfers to and from the Seafirst account, thus placing the funds outside of Unity House's authorization, and within their own control. (App., *infra*, B17).

The only property involved in this case is money. In view of that, this Court's teachings directly apply to the facts of this case.

> [T]he scheme was completely executed as respects the transactions in question *when the defendants received the money intended to be obtained* by their fraud, and the subsequent banking transactions between the banks were merely incidental and collateral to the scheme and not a part of it.
>
> We hold, therefore, that one element of the offense defined by the statute, namely that the mailing must be for the purpose of executing the fraud, is lacking in the present case. (emphasis added) *Kann, supra*, at 95.

In this case, "the defendants received the money intended to be obtained" when the $10 million was on deposit at Credit Suisse. In an unprecedented interpretation of the jurisdictional element required by the statute, the Court below held that "the final steps did not occur until defendants effected transfers to and from the Seafirst account." Nowhere in *Kann*, or in any other decision, has this Court held that the statute requires proof of actual transfers "to and from" a defendant's own bank account for the scheme to be complete.

To the extent that the decision below is based upon the five wires from Credit Suisse to Seafirst, it is clearly erroneous. The Private Participation Agreement described a "one-shot operation" for $10 million. *Schmuck v. United States,* 489 U.S. 705, 711, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989). It did not describe an "on-going scheme" as in *Schmuck. Id.*, at 711-712. [*See also Manarite, supra,* at 1413 (citing *Schmuck*)]. The relevant language of 18 U.S.C. § 1343 is also instructive:

> Whoever, having devised or intending to devise any scheme . . . to defraud, or for obtaining money . . . by means of false or fraudulent pretenses . . . transmits or causes to be transmitted by means of wire . . . for the purpose of executing such scheme . . . (emphasis added).

The decision below misinterprets the statute. The statute is drafted in the disjunctive. it requires either a "scheme . . . to defraud" or a scheme "for obtaining money . . . by means of false or fraudulent pretenses." On its face, the statute indicates that an unsuccessful scheme to defraud is still wire fraud in violation of the statute. But, when money is the objective of the scheme, once it has been obtained, the scheme is complete. When Mew "caused" Unity House to wire $10 million to Credit Suisse, and "caused" Unity House to execute a General Power of Attorney in his favor "to transfer funds out of the Credit Suisse account" (see p.8, *supra*), the scheme was complete as soon as the $10 million was on deposit at Credit Suisse. The five subsequent wires from Credit Suisse to Seafirst "were merely incidental and collateral to the scheme and not a part of it."

This Court has also enunciated a second exception commonly known as the "lulling scheme." *United States v. Maze,* 414 U.S. 395, 403, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). In a lulling scheme, subsequent mailings "lull victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely." *Id.* The five wires could not have been part of a lulling scheme because Unity House did not even know about them until well after they had been made. (RT, Rutledge, Feb. 28, 1995, pp. 46-47). Moreover, the five wires increased the chances of detection, as in *Maze,* rather than having any lulling effect. The Court below erroneously applied the "lulling scheme" rationale to Count XI which is a money laundering charge. (*See* section C, *infra*).

The element lacking in *Kann, supra,* is also lacking here. The plain language of the statute requires that the wire be "for the purpose of executing such scheme." The statute does not vest the federal courts with unlimited discretion to conduct a broad search for the statute's jurisdictional element. Absent the foregoing exceptions, this Court has held firm to its teaching in *Kann,* for the reason that outside of "those limited instances" where the statute confers jurisdiction to the federal courts, the statute leaves "all other cases to be dealt with by appropriate state law." *Id.,* at 95.

The analytical fallacy in the decision below is in the Court of Appeals' strained effort to pursue the "object" of the scheme, rather than the scheme, itself. In all of its relevant decisions, this Court has consistently focused on the completion of a scheme.

Even where, as here, a scheme "for obtaining money or property" is involved, the statute still subsumes a "scheme." The obtaining of money or property is clearly intended to be descriptive, rather than jurisdictional.

In giving statutory significance to the subject five wire transfers from Credit Suisse to Seafirst, the Court of Appeals exceeded the scope of 18 U.S.C. § 1343, and the firm parameters established by this Court. Nowhere in the statute is there any language proscribing either the disposal or use of money, once obtained. As a matter of logical sequence, Mew could not have wired the $10 million without first having "obtained" it. The statute proscribes only "those limited instances" where wires are used "for the purpose of executing such scheme."

The Government could easily have charged the wire from Hawaii to Credit Suisse, but it did not. The Government could also have charged any number of mailings prior to the wire from Hawaii to Credit Suisse, as the predicate offense, but it did not. Congress could have drafted the wire fraud statute so as to require only that the wires be in fact used as a result of the fraudulent scheme, but it did not. On all fours with this analysis are the conclusions of Justice Rehnquist in *Maze*, at 405:

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice . . .' (fn. omitted).

Finally, a thorough review of this case cannot overlook Mew's \$8.6 million wire to Anker Bank (see p.3, *supra*).[2] Inasmuch as the decision below failed to comment on the Anker Bank wire, the decision begs the question, "How do the five wires totaling \$10 million complete the scheme, more than the \$8.6 million Anker Bank wire?" The omission by the Court below tends to obfuscate this Court's teachings, and is unsupported by this Court's decisions. Accordingly, the decision below is erroneous and in direct conflict with this Court's decisions, and should be reversed.

C. The decision below is erroneous with respect to Count XI of the Superseding Indictment.

Count XI involves a bank wire for \$650,000 from Seafirst to Hawaii, allegedly in violation of 18 U.S.C. § 1956(a)(1)(A)(i). It is important that the decision below regarding Count XI be set forth verbatim. The Court of Appeals held:

> The defendants' argument is without merit for it is clear that the \$650,000 wire transfer, as well as the transfers from credit Suisse to Seafirst, the defendants' bank, were at a minimum either 'incident to an essential part of the scheme,' or 'a step in [the] plot.' *See Schmuck v. United States,* 489 U.S. 705, 711 (1989) (quotations omitted) (alteration in original).
>
> . . . . .
>
> This transfer therefore was not only relevant to the fraudulent conspiracy, but extended the overall scheme by 'lull[ing] the victims into a false sense of security, postpon[ing] their ultimate complaint

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[2] Following an unsuccessful attempt to close a bank note transaction, Mew wired the \$8.6 million back to Credit Suisse. The Ninth Circuit was inexplicably silent regarding this wire.

> to the authorities, and therefore mak[ing] the apprehension of the defendants less likely than if no [transfers] had taken place.' *See Lane*, 474 U.S. at 451-52 (quoting *Maze*, 414 U.S. at 403); *see also United States v. Maze*, 414 U.S. at 403; *see also United States v. Sampson*, 371 U.S. 75, 80-81 (1962). (App., *infra*, B16-17).

Assuming that Count XI had been a mail fraud charge, the foregoing analysis would still be erroneous, because the wire transfer fro $650,000 lacks the element set forth in *Kann*, namely, that it "must be for the purpose of executing" the scheme. The scheme as defined by the statute in light of the facts of this case is the "obtaining" of $10 million from Unity House, which had already been obtained prior to this transfer.

The real problem with the Court's analysis is that all of its is based upon the statutory requirements of the mail fraud statute. Every authority cited by the Court of Appeals deals with mail fraud. Count XI is a money laundering charge. In affirming the convictions on Count XI based strictly on the statutory requirements of mail fraud, the Court of Appeals violated the Due Process Clause by effectively amending the Superseding Indictment without prior notice to petitioners. The decision should be reversed.

D. A review of the legislative history of the money laundering statute by this Court is critically necessary to provide guidance to the lower courts.

Even the Tenth Circuit, in noting "that the Act itself prohibits a much broader range of conduct than just the 'classic' example of money laundering," expressed its concern that "a reasonable doubt persists as to the statute's intended scope." *Johnson, supra* at 569.

Indeed, the Tenth Circuit felt compelled to review the legislative history of the money laundering statute because the "statute does not unambiguously reveal its meaning." *Id.* What is clear, apparently is that in enacting the Money Laundering Control Act of 1986, "Congress had in mind the 'classic' case of laundering drug money--that is, where a drug trafficker collects large amounts of cash from drug sales" and "washes" or "cleanses" such funds through legitimate financial institutions. *Id.*

Although the statute was obviously created to serve as a new and powerful tool to be used against drug trafficking, it is equally applicable to non-drug cases. However, much as Congress may be a "lawyers' body," it cannot be expected to plan for every contingency, nor foresee every possible negative effect of its acts. Many types of non-drug money laundering cases may not be meaningful to Congress's original intent. In various types of non-drug cases, the lengthy incarceration terms carried by the money laundering statutes may even be repugnant, as a matter of public policy, especially when viewed in light of the ever-increasing problems with prison overcrowding in this country.

The enhanced sentencing provided by the money laundering statutes also creates the danger of unwarranted excesses by law enforcement, most of which, due to systemic reasons, will never receive appellate review. In this case, for example, the Government stated to the District Court during sentencing:

> Additionally, as a practical matter, these defendants are only being sentenced on the money laundering offenses. Under the guidelines given, the great disparity in sentence between money launder and wire fraud, their sentences are being given exclusively on the money laundering guidelines. There is also no basis for a stay, Your Honor. They can appeal this in the normal course. There is no need to take up an interlocutory appeal on this issue. Se we would oppose the motion and the stay. (RT, June 9, 1995 sentencing, p.9).

Confusion is evident in the Court's comments.

> So the defendants will be sentenced essentially under the money laundering guidelines, which would be the highest. I guess they considered all the counts. it would appear they have considered it. But the way it's rolled into what the appropriate sentence would be, maybe that's an issue that's not completely clear. (*Id.*, at 9-10).[3]

The obvious practical problem created by the money laundering guidelines with regards to sentencing is confusion among the district courts. Here, the District Court's confusion is even more evident in its comments leading up to Andrews' sentencing.

> So I guess the only conclusion for the court to do is to make a finding as to whether or not it should sentence by cross-reference with the money laundering count or whether it should be in the area of the fraud that would tend to drive this whole--this whole thing. But the statute seems to--the guidelines seem to speak to something just a

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[3] Andrews received a term of 30 months; Mew received a term of 236 months; Kim received a term of 189 months; and Rude received a term of 135 months.

> little bit different in doing that. And so you read the notes and you look at what the legislature is trying to do now. And to say whether or not it's eventually going to come to that, I suppose it's the same look as to the guidelines, whether it should be in terms of mandatory minimums and that sort of thing. RT, June 9, 1995, p.84.
>
> The best I can do in trying to construct, I guess, and construe those guidelines--and believe me they're not the easiest thing to do. It seems to--I don't know if 'demand' is the right word but it seems to at least bring to the conclusion that it should be a cross-reference, agree with it or not. And I don't--I don't necessarily agree with it. *Id.*, at 85.

Andrews pled guilty to one count of perjury in violation of 18 U.S.C. § 1623. Pursuant to a plea agreement, all other charges were dismissed against Andrews. Despite its generalized and confusing comments, the District court then concluded that cross-referencing to the money laundering guidelines was proper. Without entering into a detailed discussion of the District Court's analysis, the sentencing arrived at by the District Court may very well be repugnant as a matter of public policy.

Inasmuch as Congress has now rejected Amendment 18 in the 1995 cycle of amendments promulgated by the United States Sentencing Commission, this Court remains as the sole authority to provide clear guidance on the interpretation of the money laundering statute. In view of Congress's rejection of Amendment 18, the concerns giving rise to Amendment 18 are still viable and continue to plague the federal courts, resulting in mass inconsistency in their decisions, and increasing the risk of abuse in the interpretation of the statute. The foregoing concerns are at the heart of Amendment 18.

> Since then, courts have construed the elements of these offenses broadly. As a result, the Commission has found that §§ 251.1 and 251.2 do not adequately distinguish the varying degrees of offense conduct that are sentenced under these guidelines.
>
> This amendment responds to concerns about the operation of these guidelines by tying the base offense levels of the revised guideline more closely to the underlying conduct that was the source of the illegal proceeds. (Reprinted at 60 Federal Register 25074, 25085, and 57 Crim. L. Rptr. 2095, 2105).

All of the foregoing concerns are evident in this case. At the present state of Congressional proceedings, the only possibility of achieving uniformity in the decisions of the lower courts, and of minimizing the risk of abuse of the statute, is for this Court to now render a clear interpretation of the money laundering statute.

Not only as a matter of public policy, but also as a matter of compelling need, this Court should grant certiorari to review these important questions and conflicts.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

Statistics appear to indicate that the number of cases filed in the Supreme Court has greatly increased over the years.

> The number of cases filed in the Supreme Court has grown from 1,181 in the 1950 Term to 6,302 in the 1992 Term. The number filed on the paid or regular docket increased to 1,062, but the

> number filed on the *in forma pauperis* docket expanded to 4,240, more than two-thirds of the total. The reason for this disproportionate growth has been the increasing number of criminal cases, and the assignment to the mass of impoverished defendants of counsel, paid by the Government, who seem to feel obligated to appeal all cases to the highest court. Robert L. Stern, et.al, Supreme Court Practice (7th ed. 1993), § 4.1, p.163.

Added to the foregoing statistics, the Government's proclaimed "war on drugs" continues to proliferate the criminal cases in the lower courts. The intent of Congress in enacting the money laundering statutes was to create a major tool to aid the Government in its war against drugs. Consequently, the money laundering statutes will continue to play a major role in criminal prosecutions in drug and drug-related cases. As the criminal cases continue to proliferate, the money laundering statutes will undoubtedly continue to play a major role in various types of non-drug cases also.

Resolution of the questions and conflicts presented in this case is necessary to promote uniformity in the decisions of federal questions which repeatedly arise relating to the interpretation of the money laundering statutes in conjunction with fraud and other criminal activity. Trial courts will continue to need clear guidance in their decisions on important federal questions as they relate to jury instructions, sentencing guidelines, and even Constitutional questions. Regardless of the nature of those questions, they are *federal* questions which should receive clear *federal* determination and direction. Unless this Court grants certiorari, and reverses the decision of the Court of Appeals, those important questions will be decided on a random basis, virtually at the whim of each court.

Finally, in view of the far-reaching impact of the money laundering statutes in the Government's "war on drugs," and in view of the further fact that more than two-thirds of the total cases filed in this Court come from the *in forma pauperis* docket due to a disproportionate growth in criminal cases, clear guidance and precedent are needed to stem the tide of the increasing number of appeals due to conflicting decisions among the various circuits, and within a single circuit itself.

With respect to the wire fraud statute, the decision below promises to open the floodgates to fraudulent schemes where "defrauders" can easily escape the scope and purview of 18 U.S.C. § 1343, merely by never allowing money or property to come under their "complete control," and by insuring that where money is involved, such funds are never deposited into accounts under their own names. The effect of the decision below is to severely limit the scope of the statute. All of the decisions of this Court appear to focus on the fraudulent scheme activities, rather than the disposal or use of proceeds obtained as a result of the scheme. Conceivably, a victim of a fraudulent scheme could mistakenly misroute a transmission of funds. However, so long as the transmission is "for the purpose of executing" the scheme, the jurisdictional element required by the statute is met. In limited the scope of the wire fraud statute, the Court below also tends to defeat the purpose of Congress's intent in enacting the money laundering statutes, when money laundering charges are joined with wire fraud charges. These considerations provide the Court with a particularly opportune occasion to revisit the interpretation of the wire fraud statute, especially in light of the money laundering statutes.

Accordingly, this case presents a timely opportunity for this Court to provide enlightened guidance, not only on some important federal questions, including one of first impression, but also in a much-needed area of federal law.

CONCLUSION

The Petition for Writ of Certiorari should be GRANTED.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) No. 95-30198
v.)
MORREON B. RUDE,) D.C. No.
Defendant-Appellant.) CR-94-05246-3-FDB

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) No. 95-30205
v.) D.C. No.
STAFFORD Y.L. MEW,) CR-94-05246-01-FDB
Defendant-Appellant.) OPINION

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) No. 95-30207
v.)
CHARLES E. ANDREWS,) D.C. No.
Defendant-Appellant.) CR-94-05246-06-FDB

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) No. 95-30208
v.)
RODNEY H.S. KIM,) D.C. No.
Defendant-Appellant.) CR-94-05246-02-FDB

Appeals from the United States district Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
May 6, 1996--Seattle, Washington

Filed July 10, 1996

Before: Donald P. Lay,[*] Eugene A. Wright
and Edward Leavy, Circuit Judges.

Opinion by Judge Lay

SUMMARY

Criminal Law and Procedure/White Collar Crimes

The court of appeals affirmed district court judgments of conviction and sentence. The court held, among other things, that evidence was sufficient to sustain wire fraud counts, where funds were transferred from one bank to another after an initial wiring of funds and some funds were returned to an investor.

At a trial on charges of wire fraud, money laundering, and conspiracy, the government adduced evidence that appellants Morreon Rude, Stafford Mew, and Rodney Kim conspired to induce investments in "prime bank note" transactions. Evidence indicated that they made false representations regarding, among other things, whether investments would remain in the investors' own accounts. Evidence indicated that a scheme began when Rude and Mew incorporated North Pacific Investments, Inc. (NPI) as a means of perpetrating fraudulent activities. Representatives of Unity House agreed to invest in the notes. Mew and Unity's president signed a Limited Power of Attorney and a Private

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[*] Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

Participation Agreement, each prepared by Kim, authorizing an arrangement under which NPI was given a general power of attorney in order to transfer funds out of an account at Credit Suisse in Geneva, Switzerland. Unity transferred $10 million to the Credit Suisse account. Mew effected transfers of all $10 million from Credit Suisse to NPI's account at Seafirst Bank. Unity's president received a letter from Mew stating that NPI was holding $625,000 in earnings for Unity, and Rude transferred %650,000 to Unity. Unity was not aware that the money was simply part of its original investment. It understood the payment as a return on its investment. Mew and Rude also transferred $2 million to a discretionary account from which appellant Charles Andrews traded. The defendants had never purchased any prime bank notes or letters of credit.

Andrews, who had been charged with making a false declaration to a grand jury, had entered a plea to that charge in exchange for his agreement to cooperate in the prosecution of the other defendants. In the grand jury testimony, Andrews failed to disclose the number of times he had met Mew, in an effort to conceal the fact that he and Mew had been in Switzerland to set up the Credit Suisse account. A jury convicted the remaining defendants on all counts. Rude, Kim, and Mew appealed their judgments of conviction. Andrews appealed his sentence.'

[1] A Sentencing Guideline requires only that the defendants' perjury be "in respect to a criminal offense" for certain cross-referencing to be justified. [2] In this case, facts demonstrated

that Andrews' perjury was "in respect to" the other defendants' money laundering offenses. There was no error in the district court's sentencing of Andrews.

[3] It was clear that the $650,000 wire transfer, as well as the transfers from Credit Suisse to Seafirst were at a minimum either "incident to an essential part of the scheme," or "a step in [the] plot." The moneys returned to Unity were intended to create the impression that Unity was earning an immediate, substantial return on its investment. [4] The fraud was not complete until the $10 million deposited in Credit Suisse was within the defendants' complete control. Although effecting a transfer to Credit Suisse was a step in the scheme, the final steps did not occur until the defendants effected transfers to and from the Seafirst account. The evidence was sufficient to sustain the wire fraud counts.

[5] A review of the record evidence showed that Rude specifically intended to participate in the conspiracy. [6] Viewing evidence in the light most favorable to the government, Kim clearly intended to further the fraudulent scheme.

[7] There was no prejudicial variance between the Superseding Indictment and the evidence adduced by the government. The Superseding Indictment charged a scheme to defraud investors, including Unity, through investments involving the purchase and sale of prime bank debt obligations. It was clear that the Unity solicitation was part of a single broad scheme of fraud that took place over a roughly two-year period.

[8] Jury instructions required both a unanimous finding concerning the existence of the underlying false statements and a specific finding that the scheme found matched that charged in the Superseding Indictment. Those instructions were proper.

[9] The defendants alleged that the prosecutor's opening statement was peppered with inflammatory jingles such as "scam," "victim," and "con." They maintained that prejudicial conduct persisted throughout the trial, including the prosecution's statements in closing argument. They suggested the prosecutor, among other things, referred to them as "crooks" or "evil" at least 11 times and used terms of phrases such as "con man," "charlatans," "trolling around for victims," "lie," "lies," or "lied" over 90 times. [10] However, viewed in its entirety and in the context of the month-long trial, the government's choice of terms and phrases was not overly repetitious, and in fact reasonably described defendants' practices. There was no prejudicial error in the allowance of the prosecution's statements in closing argument.

[11] Although a witness extended his hand to the prosecutor, research revealed no case suggesting it is improper for a prosecutor, without more, simply to shake hands with a witness upon the close of his testimony in the jury's presence.

[12] At trial, two witnesses testified concerning Mew's alleged prior fraudulent practices, [13] and the admission of that evidence withstood a relevant analysis relating to the admissibility of prior bad acts evidence. The testimony was relevant, [14] and reliable. The alleged schemes were strikingly similar to the charged

offenses, as each involved "prime bank" notes and related instruments, and each involved promises of high rates of return. [15] The fact that the alleged prior acts occurred seven and eight years earlier was not troubling.

[16] A search warrant issued in the case authorized the seizure of certain documents dating from May 1992 and pertaining to the defendants and NPI. [17] That warrant was sufficiently specific. [18] The government conceded that agents seized several documents pre-dating May 1992, but urged that those documents were properly seized under the "plain view" doctrine. [19] Even assuming the searches for and seizures of certain documents were not justified by the plain view doctrine, that evidence was only material to the testimony of the two witnesses as it pertained to Mew's alleged prior fraudulent schemes. [20] Evidence admitted as a result of any illegal search did not have a "substantial and injurious effect or influence in determining" the verdict.

COUNSEL

Charles A. Johnston, Felker, Lazares & Johnston, Tacoma, Washington, for defendant-appellant Rude; Ronald G.S. Au, Honolulu, Hawaii, for defendant-appellant Mew; Stephen E. Robinson, Fleeson, Gooing, Coulson & Kitch, Wichita, Kansas, for defendant-appellant Andrews; Ronald D. Ness, Port Orchard, Washington, for defendant-appellant Kim.

Robert M. Westinghouse and Carl Blackstone, Assistant United States Attorneys, Seattle, Washington, for the plaintiff-appellee.

OPINION

LAY, Circuit Judge:

These consolidated appeals involve a scheme to defraud investors, including Unity House, Inc., a Hawaii non-profit corporation, of several million dollars. Morreon B. Rude, Rodney H.S. Kim, and Stafford Mew appeal their judgments of conviction for wire fraud, money laundering, and conspiracy. Charles Andrews, who pleaded guilty to one count of testifying falsely before a grand jury in exchange for cooperation in the prosecution of the other defendants, appeals his sentence. We affirm.

THE "PRIME BANK NOTE" SCHEME

At trial the government adduced evidence that the defendants conspired to induce investments in what they termed "prime bank note" transactions.[1] The subject transactions were described to potential investors as a form of international bank paper purchased from issuing banks at a discount and sold to wholesale banks for a profit. Defendants held themselves out as persons experienced in such transactions and assured potential investors that the notes would yield monthly returns of roughly two to five percent. They further represented that the investments would not be at risk and in fact would remain in the investors' own accounts. Each of these representations was false.

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[1] The government maintains that the very notion of a "prime bank note" transaction is fictitious.

The scheme began in May 1992, when Morreon Rude and Stafford Mew incorporated North Pacific Investments, Inc. ("NPI"), a Washington corporation, as a means of perpetrating defendants' fraudulent activities.

In December 1992, after several furtive attempts to sell the notes to third parties, representatives of Unity House, a Hawaii non-profit company with assets of more than $50 million, agreed to invest $10 million in the notes. They asked Roderick Rodriguez, the executive director of Unity House, to contact Bank of America to obtain a letter of credit, but Bank of America declined. Mew, NPI's principal, offered to procure a letter of credit from a European bank on behalf of Unity House. Mew represented that an account for Unity House could be opened at Credit Suisse in Geneva, Switzerland, and that the money would remain in the bank earning interest. The representatives of Unity House accepted Mew's proposal. Anthony Rutledge, the president of Unity House, and Mew signed a Limited Power of Attorney and Private Participation Agreement, each prepared by Kim, authorizing the arrangement, whereunder NPI was given a general power of attorney in order to transfer funds out of the Credit Suisse account. Mew then enlisted the help of Charles Andrews, a commodities broker with a seat on the Chicago Mercantile Exchange, who met him in Geneva, Switzerland to establish the account. On January 19, 1993, Unity House transferred $10 million to the Credit Suisse account.

Between February and April 1993, Mew effected transfers of all $10 million from Credit Suisse to NPI's account at Seafirst Bank. In April, Rutledge received a letter from Mew stating that NPI was holding $625,000 in earnings for Unity House, and in July 1993 Rude transferred $650,000 to Unity House. Unity House was not aware, however, that the money was simply part of its original investment; it understood the payment as a return on its investment, and in fact did not learn of NPI's activities until September 1993, when Rutledge was interviewed by law enforcement agents. In addition, Mew and Rude transferred $2 million to a discretionary account from which Andrews traded until November, when the remaining $350,000 was seized. Andrews received $400,000 in commissions during the course of the trading, and the balance of that $2 million was lost. Another substantial portion of the money was deposited in various accounts and used to trade stocks and commodities, generating losses of approximately $3,667,000. Federal agents seized most of this money. Of the remaining funds, Mew and Rude together received $588,538; Kim received $106,666; and Gonzales received $792,000. The defendants never purchased any prime bank notes or letters of credit, though they maintain that they attempted to do so.

Law enforcement investigations led to a grand jury proceeding in August 1993. Rude then first admitted that Unity House was the source of the $10 million transferred to NPI's Seafirst account. He claimed the money was a loan, and records he produced referred to the transaction as such. In November 1993, federal agents seized the funds in NPI's various accounts. Kim, Rude, Mew, and Jack Gonzales[2] were indicted on April 20, 1994.

Andrews appeared before a grand jury in Seattle on December 15, 1993. During his testimony, he failed to disclose the number of times he had met Mew, in an effort to conceal the fact that he and Mew had been in Switzerland to set up the Credit Suisse account. On September 14, 1994, the grand jury returned a superseding indictment charging Andrews, along with Mew, Kim, and Gonzales, with conspiracy, wire fraud, and money laundering. Andrews was also charged with making a false declaration to the grand jury. He later admitted that he had testified falsely and entered a plea to that charge in exchange for his agreement to cooperate in the prosecution of the other defendants.[3] The remaining four defendants proceeded to trial, and a jury convicted them on all counts on March 21, 1995. Kim, Rude, and Mew were sentenced on June 9, 1995.[4]

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[2] Gonzales too was convicted, but he is not a party to this appeal.

[3] Andrews was sentenced to a 30-month term of imprisonment, to be followed by a three-year term of supervised release. As a condition of his supervised release, the court ordered him to make restitution to Unity House in the amount of $10 million. Pursuant to the plea agreement, the court dismissed the remaining charges against Andrews.

[4] Mew received a sentence of 236-months imprisonment, Kim received a sentence of 189-months imprisonment, and Rude received a sentence of 135-months imprisonment, each to be followed by a three-year term of supervised release. Like Andrews, the other defendants were ordered to pay restituion of $10 million to Unity House.

CHARLES ANDREWS

Andrews argues that the district court erred in the imposition of his sentence by failing to make factual findings requisite to the application of U.S.S.G. § 2J1.3(c)(1)(1994), which provides:

> If the offense involved perjury, subornation of perjury, or witness bribery in respect to a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Andrews acknowledges that cross-referencing U.S.S.G. § 2X3.1 would have been appropriate had the district court found that he committed perjury "in respect to" the criminal offense of money laundering, for which his co-defendants were convicted, but suggests the court applied § 2X3.1 notwithstanding its failure to make such a finding, thus violating both § 2J1.3 and Fed. R. Crim. P. 32(c)(3)(D). Although he objected to the presentence investigative report's characterization of the facts, he suggests the court simply deferred to the probation officer's recommendation to cross-reference § 2X3.1 without addressing his objections.

Contrary to Andrews' claim, we find that the district court was aware that it needed to make such a finding, and that it did so. *See* Excerpts of Record D at 28 ("[T]hat will be my finding, that the offense level will be based on that cross reference."). Rule 32(c)(1) does not require that court to articulate the reasoning for its finding. *See United States v. Karterman*, 60 F.3d 576, 583 (9th Cir. 1995); *United States v. Fagan*, 996 F.2d 1009, 1016 (9th Cir. 1993); *United States v. Peters*, 962 F.2d 1410, 1415 (9th Cir.

1992). Although the court did not articulate the facts upon which it relied in ruling as it did, we are satisfied that the requisite finding was made.

[1] The remaining issue is whether the court's finding that Andrews committed perjury in respect to the money laundering offenses of his codefendants was justified. U.S.S.G. § 2J1.3(c)(1) required only that the defendant's perjury be "in respect to a criminal offense" for cross-referencing to be justified. The Guideline requires neither that the defendant have committed perjury in respect to his *own* criminal offense, nor that he have committed perjury in respect to an *adjudicated* criminal offense. Provided an indictment and conviction are forthcoming, as they were here, and so long as the defendant knew or had reason to know, at the time of his perjury, that his testimony concerned such a criminal offense, the "in respect to" element of § 2J1.3(c)(1) is satisfied.

[2] At the time of his perjured testimony, Andrews knew that Mew was under investigation for money laundering and wire fraud, as verified by a memorandum he prepared and sent to Mew following his interview with federal agents, and the seizure warrant itself, which detailed the factual basis for the forthcoming allegations. Andrews also knew that Mew did not want him to tell the grand jury about the Credit Suisse account – a fact which belies his claim that he thought the charges arose from a legitimate business transaction. These facts demonstrate that Andrews' perjury was "in respect to" the other defendants' money

laundering offenses. We find no error in the district court's sentencing of Andrews.

RUDE, KIM, AND MEW

Rude, Kim, and Mew jointly and individually have raised various claims on appeal. They challenge (1) the sufficiency of the evidence to sustain their convictions; (2) the legal sufficiency of the Superseding Indictment and the government's variance therefrom; (3) multiple aspects of the jury instructions; and (4) the conduct of the prosecution during trial.[5] Mew raises separate claims that the district court erroneously (1) admitted evidence of other crimes involving fraudulent misconduct under Fed. R. Evid. 404(b); (2) denied his motion for a continuance; and (3) denied his motion to suppress evidence which was allegedly illegally seized from his residence.

THE SUFFICIENCY OF THE EVIDENCE

Defendants claim that the evidence was insufficient to support their wire fraud convictions, under Counts One through Five, for violating 18 U.S.C. § 1343. They observe that they were not charged with wire fraud for the *initial* wiring of funds from Hawaii to Credit Suisse, but rather for the transfers of funds from Credit Suisse to Seafirst Bank, and for returning funds to Unity House in the sum of $650,000. Defendants maintain that the latter transfers were not in furtherance of the fraud, as the wire fraud was completed at the point when Unity House wired $10 million from Hawaii to Credit Suisse. If the wire fraud counts cannot be sustained, their argument continues, their convictions for money laundering and conspiracy must also be overturned, since the latter counts were dependent upon the underlying wire fraud convictions. In support of these contentions, defendants rely upon *United States v. Lane*, 474 U.S. 438 (1986), *United States v. Maze*, 414 U.S. 395 (1974), and *Kann v. United States*, 323 U.S. 88 (1944).

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[5] Each of the parties relies on Fed. R. App. P. 28(I) and adopts by reference the claims in one another's briefs. To avoid confusion, we discuss the claims as if they are applicable to all three defendants, except where otherwise noted.

[3] The defendants' argument is without merit, for it is clear that the $650,000 wire transfer, as well as the transfers from Credit Suisse to Seafirst, the defendants' bank, were at a minimum either "incident to an essential part of the scheme," or "a step in [the] plot." *See Schmuck v. United States*, 489 U.S. 705, 711 (1989)(quotations omitted)(alteration in original). The moneys returned to Unity House, for example, were intended to create the impression that Unity House was earning an immediate, substantial return on its investment, as promised by the defendants. This transfer therefore was not only relevant to the fraudulent conspiracy, but extended the overall scheme by "'lull[ing] the victims into a false sense of security, postpon[ing] their ultimate complaint to the authorities, and therefore mak[ing] the apprehension of the defendants less likely than if no [transfers] had taken place.'" *See Lane*, 474 U.S. at 451-52 (quoting *Maze*, 414 U.S. at 403); *see also United States v. Sampson*, 371 U.S. 75,

80-81 (1962). The instant case is distinguishable from the fraudulent credit card scheme involved in *Maze*, where the goods were immediately obtained by the fraud, and where parties other than the defendants completed the underlying mail transfers. *See* 414 U.S. at 402-05.

[4] Regarding the transfers from the Credit Suisse account to Seafirst, the defendants overlook the fact that their fraud was not complete until the $10 million deposited in Credit Suisse (in Unity House's account) was within their complete control. Unity House was falsely promised that its money would remain in the Credit Suisse account. Although effecting a transfer to Credit Suisse was a step in the scheme, the final steps did not occur until defendants effected transfers to and from the Seafirst account, thus placing the funds outside of Unity House's account, outside of the scope of Unity House's authorization, and within their own control. *See United States v. Sindona*, 636 F.2d 792, 802 (2d Cir. 1980) ("A scheme to defraud is not complete until the proceeds have been received and use of the mail or wires to obtain the proceeds satisfies the jurisdictional element."), *cert. denied*, 451 U.S. 912 (1981). Thus, we find the evidence sufficient to sustain the wire fraud counts.

Specific Intent

Rude suggests the only evidence offered to prove that he possessed the requisite specific intent to defraud concerned his acts in arranging the $650,000 wire transfer to Unity House and in wiring notes of corporate minutes unrelated to the case. We have already rejected Rude's argument that the wire transfers to and from the Seafirst account, including the transfer to Unity House, were not part of the scheme to defraud. As to his claim that his involvement was otherwise limited to wiring corporate minutes, a review of the record does not support this assertion.

[5] The prosecution presented evidence that Rude: acted as the front man who incorporated NPI; opened bank and brokerage accounts; at least once lied concerning the corporation's equity and income; structured transactions through the accounts he established to avoid filing Currency Transaction Reports; concocted board minutes; wired a portion of Unity House's own money back to it as a purported return on their investment, knowing that no return had been earned; transferred several millions to other accounts and to himself; and falsely stated to law enforcement authorities and a federal grand jury that NPI simply had invested its own funds. A review of the record evidence plainly shows that Rude specifically intended to participate in the conspiracy.

Kim contends that there is no support for the prosecution's repeated assertions that he was more than the attorney who drafted the Limited Power of Attorney and Private Participation Agreement in the Unity House transaction. He suggests he lacked knowledge of the five bank wires comprising the bases for the charges and, like Rude, maintains that proof of specific intent may not be based on constructive knowledge of facts known to others.

[6] We disagree. On several occasions, Kim solicited prime bank note transactions; falsely claimed to have learned the trade while seeking funding for a client in Europe in the 1980s; and represented that the prime bank notes would yield absurdly high returns. He assured that the deal with Unity House would close by preparing the Private Participation Agreement and Limited Power of Attorney, which falsely represented that NPI was experienced in prime bank note transactions. He also structured the conversion of a portion of currency checks payable to Mew and, finally, offered Robert Cabral, a Unity House marketing agent, a bribe to take responsibility for false promises made in one of NPI's subsequent, unsuccessful prime bank note presentations. Viewing this evidence in the light most favorable to the government, Kim clearly intended to further the fraudulent scheme.

THE SUPERSEDING INDICTMENT

The defendants' initial challenge to the legal sufficiency of the superseding indictment is similar to their challenge to the sufficiency of the evidence. As recited above, defendants claim that the fraudulent scheme was complete once Unity House wired the $10 million to the Credit Suisse bank account established in Unity House's name and that, in consequence, the wirings of the $10 million to NPI's Seafirst account were not in furtherance of the scheme and therefore not actionable. Rude and Kim urge that Stafford Mew was the sole signatory with a general Power of Attorney on Unity House's account, and suggest there is no evidence to show that they even know of those documents or the limited transfer from Unity House to Credit Suisse. The defendants, however, took integral steps in the fraudulent scheme when they effected transfers of money from Credit Suisse to their Seafirst account in the state of Washington. We thus reject this contention.

[7] The defendants also assert that there was a prejudicial variance between the charges against them and the proof offered at trial. The Superseding Indictment charged a scheme to defraud investors, including Unity House, through investments involving the purchase and sale of prime bank debt obligations. It is clear that the Unity House solicitation was part of a single broad scheme of fraud which took place over a roughly two-year period. We find no prejudicial variance between the Superseding Indictment and the evidence adduced by the government.

Along the same line, the defendants claim that the Superseding Indictment was multiplicitous because they were punished twice for the same offense. They assert that the money laundering Counts, Six through Eleven, are merely a relabeling of the five bank wirings charged in the wire fraud Counts, One through Five. We find no merit to this claim. An indictment is multiplicitous if it charges a single offense in several counts. *See e.g., United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). It is well established, however, that money laundering and wire fraud are separate offenses. *See United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir.), *cert. denied*, 115 S. Ct. 250 (1994); *United States v. Piervinanzi*, 23 F.3d 670, 680 (2d Cir.), *cert. denied*, 115 S. Ct. 259 & 267 (1994); *see also United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992).

JURY INSTRUCTIONS

The defendants raise several challenges to the district court's jury instructions. specifically, they claim that the court erred in failing to instruct the jury concerning a single scheme to defraud; in instructing the jury that the defendants need not have succeeded in obtaining money or property or in causing others to lose money through their scheme; in instructing the jury on aiding and abetting liability; and in shifting the burden of proof from the prosecution to the defense.[6]

Single Scheme to Defraud

Defendants argue that the court erred in failing to instruct the jury concerning the requirement that they find a single scheme to defraud, as alleged in the indictment. They rely on *United States v. Mastelotto*, 717 F.2d 1238, 1247 (9th Cir. 1983), which held:

> In a ... wire fraud case in which a defendant contends that a variance has occurred between the single scheme charged in each count of the

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[6] The government asserts that the defendants failed to object to the instructions at the time of the trial, as requried by Fed. R. Crim. P. 30. Rude concedes that he did not object, and we can find no objection by Mew. Kim, however, asserts that a number of objections were timely made and that all defendants joined in the objections. Notwithstanding the dispute over whether the defendants properly objected (and our reading of the transcript verifies that the defendants failed properly to object to most of the instructions contested on appeal), we nonetheless have reviewed these instructions and find no prejudicial error.

> indictment and the proof at trial, the jury must be instructed that each of the jurors must find the defendant guilty of participation in the same single scheme to defraud *and* that the scheme to defraud in which the defendant is found to have participated is the same scheme as the overall fraudulent scheme alleged in the indictment.
>
> If the jurors are not instructed that they must all agree on the existence of the same scheme to defraud, the defendant's right to a unanimous jury verdict as guaranteed by article III, § 2 of and the sixth amendment to the United States Constitution is infringed.

Defendants assert that Instructions 16, 17, 18, and 22, which pertain to the charges of a scheme, failed to meet this standard.

We find that the instructions were proper and did not deprive the defendants of their constitutional rights. Although, as we have concluded, the Superseding Indictment charged and the proof offered supported a finding of a single scheme, Instruction 16 stated in relevant part:

> In order for a defendant to be found guilty of [wire fraud], the Government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant made up a scheme or plan to defraud individual and organizational investors, including Unity House, Inc., and to obtain money from the investors by means of false promises or statements, *with all of you agreeing on at least one particular false promise or statement that was made;* ....

(Emphasis added.) Instruction 18 stated:

> The scheme to defraud charged in the Superseding Indictment is made up of various acts. It is not necessary for the Government to prove all of them, as long as sufficient evidence is shown to establish beyond a reasonable doubt that the scheme, *substantially as charged*, was set up. (Emphasis added.) Thus, the instructions required both a unanimous finding concerning the existence of the underlying false statements and a specific finding that the scheme found matched that charged in the Superseding Indictment. We find these instructions proper.

The Successfulness of the Scheme

Defendants also challenge Instruction 22, which stated:

> It is not necessary for the Government to prove that the defendants were actually successful in obtaining money or property by means of false or fraudulent pretenses, representations, or promises. It is not necessary for the Government to prove that anyone lost any money or property as a result of the scheme or plan.
>
> An unsuccessful scheme to defraud is as illegal as a scheme or plan that is ultimately successful.

This instruction correctly states the law, in that the mail and wire fraud statutes do not proscribe only *successful* schemes. *See, e.g., United States v. Olson,* 925 F.2d 1170, 1175 (9th Cir. 1991).

Aiding and Abetting Liability

Defendants next challenge Instructions 24 and 34, which instructed the jury concerning aiding and abetting liability. They assert that this was plain error, as no defendant was separately charged with aiding and abetting under 18 U.S.C. § 2.

We disagree. Each of the wire fraud and money laundering Counts charged violations of 18 U.S.C. § 2. Moreover, it is well settled that "aiding and abetting are implied in every indictment" for a substantive offense. *United States v. Armstrong,* 909 F.2d 1238, 1242 (9th Cir.), *cert. denied,* 498 U.S. 870 (1990).

Burden of Proof

Finally, defendants contend that Instructions 28-31 and 34-37, read together, effectively shifted the burden of proof from the government to them. Defendants' arguments are unsupported by any authority and fail to delineate the manner in which they were prejudiced. We have reviewed them individually and as a whole, and we find no prejudicial error. Those instructions containing the substantive elements of the offenses charged *each* state, in no uncertain terms, that the government bore the burden of proving its case "beyond a reasonable doubt."

THE PROSECUTORIAL MISCONDUCT CLAIMS

The defendants urge that they were deprived of a fair trial by prosecutorial misconduct.

Inflammatory Language

[9] The defendants first allege that the prosecutor's opening statement was peppered with inflammatory jingles such as "scam," "Ponzi Scheme," "gibberish," "victim," "outlandish," "charlatan," "con," "deceit," "misrepresentation," "falsehoods," "fool's mission," "fictitious business entity," "store front office," and "front person." They acknowledge that each statement itself may have been harmless, but suggest that their cumulative effect

crossed the line between permissible oratorical tactics and comments calculated to incite jury prejudice. They maintain that this prejudicial conduct persisted throughout the trial, including the prosecution's statements in closing argument. They suggest the prosecutors referred to the defendants as "crooks" or "evil" at least eleven times; used terms or phrases such as "con man," "charlatans," "trolling around for victims," "lies," or "lied" over 90 times; and also used words such as "Ponzi Scheme," "practicing their craft," "perfecting their craft," and "victim."

The parties dispute whether defendants objected to the government's use of inflammatory words at trial.[7] Resolving this issue in the defendants' favor, we nonetheless conclude that the district court did not abuse its discretion in failing to grant a mistrial (which was not requested by the defendants) or in sustaining any objection. The district court specifically found that "[t]he opening and closing remarks, while containing an element of righteous indignation, were within the boundaries of proper openings and summations." We agree. The terms "victim," "deceit," "misrepresentation," "falsehoods," "fictitious business entity," "outlandish," "gibberish," and even "charlatan" and "scam," for example, are not even properly characterizable as slang.[8] Moreover, the law permits the prosecution considerable latitude to strike "hard blows" based on the evidence and all reasonable inferences therefrom. *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993), *cert. denied*, 115 S.Ct. 330 (1994).

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[7] The government maintains that the defendants made no objection, but the defendants note that they objected twice during opening statement, once during trial, and once during closing argument. They also note that objections or motions raised by one defendant were automatically joined by the others.

[10] Viewed in their entirety and in the context of the month-long trial below, the government's choice of terms and phrases was not overly repetitious, and in fact reasonably described the practices of defendants. As noted in *Guam v. Torre*, 68 F.3d 1177, 1180 (9th Cir. 1995), "there is no rule of evidence or ethics that forbids the prosecutor from referring to the crime by its common name when examining a witness. There is no rule requiring the prosecutor to use a euphemism for it or preface it by the word 'alleged.'" *See also United States v. Bracy*, 57 F.3d 1421, 1431 (9th Cir. 1995) (upholding prosecution's reference to defendant as "'the imminent source of evil in this courtroom–at this moment'"); *United States v. Taxe*, 540 F.2d 961, 968 (9th Cir. 1976) (upholding in fraud case use of terms "fraud," "scavenger," "parasite," and "professional con-man"), *cert. denied*, 429 U.S. 1040 (1977). although there is a point at which prosecutorial comments are no longer reasonably descriptive and therefore serve no purpose other than to incite prejudice in the jury, the prosecution did not cross that point here, and we decline to impose formalistic restrictions on its vocabulary. For this reason, we also find no prejudicial error in the allowance of the prosecution's statements in closing argument.

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[8] The dictionary defines "scam" as "a fraudulent or deceptive act or operation." Webster's Ninth New Collegiate Dictionary 1047 (1984). It defines "charlatan" as "one making usu. showy pretenses to knowledge of ability: FRAUD, FAKER." *Id.* at 228. These are just the kinds of fraudulent acts the government indicted and proved.

The Charge of Mischaracterization

The defendants also allege that the government mischaracterized their activities by implying that trading in prime bank notes was a wholly fictitious concept, despite the contrary testimony of its own witness, Agent Steven Studhalter, who defined the term "prime bank."

It is true that the prosecution may neither "assume prejudicial facts not in evidence," nor "insinuate the possession of personal knowledge of facts not offered in evidence." Torre, 68 F.3d at 1179-80. Here, however, the government presented other testimony from which the jury could conclude beyond a reasonable doubt that the very notion of a "prime bank note" was fictitious. Neal Aoki, an attorney employed by the Hawaii Securities Enforcement Unit, testified that the term "prime bank" had no meaning in the financial industry and was commonly associated with fraud schemes. A juror could reasonably infer from this testimony that defendants' business activities were a front. We thus cannot conclude that the government made prejudicial claims not supported by evidence.[9]

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[9] The defendants also argue that the government repeatedly referred to gambling, in violation of the court's pre-trial orders. The court ruled such statements admissible, however, provided the government could tie the fraud proceeds to gmabling. Viewed in the lgiht most favorable to the government, the evidence supports the allegation that the proceeds were tied to gambling.

Vouching

Defendants' final allegation of prosecutorial misconduct is a claim of impermissible prosecutorial vouching. The prosecution openly greeted a witness passing in front of the jury box. Rude's counsel objected, but the court simply admonished the prosecution; it did not provide curative instructions to the jury. The defendants suggest this was impermissible vouching and grounds for reversal.[10]

[11] This argument misconceives the doctrine of vouching, which applies where the prosecutor personally assures the jury concerning a witness's credibility or expresses a personal opinion regarding the defendant's guilt. *Cf. United States v. Williams*, 989 F.2d 1061, 1071 (9th Cir. 1993); *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993). In fact, only one witness extended his hand to the prosecutor, and our research revealed no case suggesting it is improper for a prosecutor, without more, simply to shake hands with a witness upon the close of his testimony in the jury's presence. A prosecutor's open handshake with a witness neither lends governmental imprimatur to his testimony nor personally assures the jury of its credibility.

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[10] Defendants also claim that the United States engaged in improper vouching by presenting two pie charts to the jury which demonstrated the disposition of the fraud proceeds. This court has recognized, however, that the government may, in a fraud case, prove that the defendants did not use the funds obtained for their intended purpose. *See United States v. Brutzman*, 731 F.2d 1449, 1452 (9th Cir. 1984) ("The misuse of the funds directly established the fraudulent nature of the scheme.") A different result is not required simply because the government used pie charts to this end.

404(b) EVIDENCE

[12] Mew asserts that the court erred in refusing to grant his motion to exclude evidence of other fraudulent transactions relating to him and dating back to 1986. At trial, two witnesses, Brian Ajifu and Norman Frank, testified concerning Mew's prior fraudulent practices. Ajifu testified that he was enticed to invest $50,000 in a similar scheme by Mew's representation, through a company with which he associated, ADR Industries ("ADR"), that he would earn five times his investment within two to three months. Subsequently, when Ajifu told Mew that he had contacted the FBI, Mew told him not to say anything and to treat the invested funds as a loan. Frank likewise testified that, near the same time, Mew promised him a 25% return on his investment in three months. Frank initially invested $85,000, but when mew told him his investment had doubled, he invested another $50,000, all of which was lost. mew acted through IBI Financial ("IBI"), another business entity, during this period, Prior to trial, mew filed a motion in limine to exclude the testimony under Fed. R. Evid. Rule 404(b), which was denied. We review its denial for an abuse of discretion. *United States v. Luna,* 21 F.3d 874, 878 (9th Cir. 1994).

Mew suggests the testimony of Ajifu and Frank was irrelevant to the Unity House transaction, remote in time, and insufficient to support a finding that he committed the other acts. he also notes that this court "has specifically incorporated Rule 403's probative value/unfair prejudice balancing requirement into the Rule 404(b) inquiry," *United States v. Mayans,* 17 F.3d 1174, 1183 (9th Cir. 1994), and suggests the court below failed to conduct a Rule 403 analysis.

[13] The admission of this evidence withstands the four-part analysis of *United States v. Spillone,* 879 F.2d 514, 518-20 (9th Cir. 1989), *cert. denied,* 498 U.S. 864 & 878 (1990), which holds that prior bad acts evidence is admissible if it (1) tends to prove a material point; (2) is not too remote in time; (3) is sufficient to support a finding that the defendant committed the other act; and (4) in some cases, concerns an offense similar to that charged. The testimony was relevant to demonstrate defendants' fraudulent intent, as it established that Mew was not simply a highly optimistic, but negligent, investor. *See United States v. Sarault,* 840 F.2d 1479, 1485 (9th Cir. 1988); *United States v. Jenkins,* 785 F.2d 1387, 1395 (9th Cir.), *cert. denied,* 479 U.S. 889 (1986).

[14] We also find the challenged evidence reliable. Both Ajifu and Frank testified that Mew employed similar, fraudulent investment tactics, around the same period of time, to induce them to invest. Their testimony not only was specific concerning the nature of the transactions and the promised returns, but was corroborated by documentary evidence and sufficient to support a finding that Mew committed the alleged frauds. The schemes were strikingly similar to the charged offenses, as each involved "prime bank" notes and related instruments, and each involved promises of high rates of return. Nor were the prior acts too remote in time.

[15] Given the similarity and relevance of the offenses, we are not troubled by the fact that they occurred seven and eight years earlier. This circuit has not adopted a bright line rule concerning remoteness in time, *Spillone*, 879 F.2d at 519, and, where the prior acts were similar to those charged, previous decisions have upheld admission of evidence of acts up to twelve years old. *See United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (acts occurring twelve years ago not too remote), *cert. denied*, 494 U.S. 1083 (1990). As to Mew's claim that the court below failed to apply Rule 403, we note that the court specifically found that the probative value of the evidence "outweigh[ed] any prejudice which may be present." This argument is therefore meritless as well.

CONTINUANCE

Mew also contends that the district court erred in denying his request for a continuance. He asserts that he lacked time to prepare an adequate defense, given the massive production of exhibits and documents no more than 11 or 12 days prior to trial. This lack of time, and the case's complexity and his pre-trial detention, assuredly deprived him of a fair trial.

We review a trial court's ruling on a request for a continuance under an abuse of discretion standard. it is settled that we will reverse only of the decision is "arbitrary and unreasonable." *United States v. Tham*, 960 F.2d 1391, 1396 (9th Cir. 1991).

Although there was a concededly large volume of materials produced by the government in this case, the defendants were kept informed of this fact by three separate notices from the government. In addition, it provided an exhibit list two weeks prior to trial. *Jencks* materials were provided ten days before the first witness testified. *See Jencks v. United States*, 353 U.S. 657 (1957).

Furthermore, as the court recognized, a continuance would greatly have inconvenienced the government, the court, and out-of-state witnesses under subpoena. Nor has Mew shown the particular manner in which he was prejudiced by the denial of a continuance: he has not suggested he would have done additional investigation based on the new discovery, or that he was unable to use the discovery in cross-examining witnesses or in presenting his defense. In the absence of any particular proof of prejudice, we cannot say the court below abused its discretion in denying the continuance, particularly since it perceived a threat of flight. Moreover, the trial court found that defendant's counsel "came into the case with the understanding that if you couldn't come in and pick up the baton and keep the race going, that this was not the case to come into. I believe your assurance to the Court was that that would be no problem" Thus, we find no abuse of discretion.

THE FOURTH AMENDMENT CLAIMS

[16] Although each of the defendants' residences as well as the offices of NPI were searched, only Mew has standing to challenge

the search of his residence.[11] The search warrant issued in the present case authorized the seizure of the following documents dating from may 1992 to the present and pertaining to the defendants and NPI:

> Business records ... Bank account records ... Brokerage account records ... Credit card record statements and payment records ... Records of domestic and foreign travel ... Records pertaining to potential victims and associates, to include, but not be limited to, telephone toll records, letters, memos, correspondence, address books, diaries, photographs, video and audio recordings ... Currency and other valuable items, such as gold and jewelry, traceable to fraud and money laundering.

Mew asserts that the search warrant was overly broad in scope and failed to state with particularity any guidelines for the agents to determine objectively whether a document to be seized related to wire fraud or money laundering. he also argues that many of the documents seized by the government pre-dated May 1992, and that none of these documents pertained to NPI or to the Unity house fraud.

The Validity of the Warrant

while a search warrant must describe items to be seized with particularity sufficient to prevent "a general, exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)(plurality), it need only be "reasonably specific, rather than elaborately detailed," *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), and the specificity required "varies depending on the circumstances of the case and the type of items involved," *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

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[11] As earlier explained, the aprties have attemtped to incorporate by reference the arguments in each other's briefs. Neither Rude nor Kim, however, has standing to challenge the search of Mew's residence. Conversely, Mew lacks standing to challenge the search of any other defendant's residence.

[17] The warrant here was sufficiently specific. As the district court noted, the warrant was limited to post-May 1992 documents, and to records pertaining to five individuals and one corporation. Any search for relevant documents is likely to retrieve *some* information that ultimately is beyond the core of evidentiary material produced at trial. An objective basis for distinguishing relevant documents from others is therefore necessary to ensure that the search is limited. Here, the specification of dates, individuals, and the NPI corporation, along with a reasonably precise delineation of the type of records sought, satisfied the specificity requirement. In *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991), this court upheld a warrant authorizing the search of an attorney's office for documents because the list of documents sought "was qualified by the requirement that the document seized by 'in the name of or have reference to' [the defendant] or [the persons] or entities that had been linked to [the defendant] through the investigation." Such is the case here. Moreover, the agents did not conduct a

wholesale seizure of Mew's records, but left "a large volume" behind. RT 12/16/94 at 137-38.

The district court's finding that Mew's business was "permeated with fraud," thereby justifying an extraordinarily broad seizure of document, bolsters or conclusion. CR 107 at 6. *See United States v. Office Known as 50 State Distributing Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983)(broad search for business records is permissible if probably cause exists to believe fraud permeates the entire business operation), *cert. denied*, 465 U.S. 1021 (1984). The affidavit supporting the search warrant validates the lower court's finding, as it is clear therefrom that NPI's central purpose was to serve as a front for defrauding prime bank note investors. Accordingly, we find that the warrant itself was neither overly broad nor insufficiently specific.

The Plain View Doctrine

[18] As to the seizure of material outside the scope of the warrant, the government concedes that its agents seized several documents pre-dating May 1992, but urges that these documents were properly seized under the "plain view" doctrine. Mew argues that, under the plain view doctrine, the incriminating character of the documents must be "'immediately apparent.'" *See Horton v. California*, 496 U.S. 128, 136 (1990)(quoting *Coolidge*, 403 U.S. at 466 (plurality opinion)). The record reveals that the agents had to peruse each document to determine whether it related to other fraudulent activity.

The government maintains that the pre-May 1992 documents pertained to Mew's prior fraudulent activities with IBI and ADR, concerning which they had probable cause. Agent Dana MacDonald, who oversaw the search of Mew's residence, testified that the agents were informed prior to the search concerning previous criminal investigations of IBI and ADR. The government thus suggests that the incriminating nature of these documents was "immediately apparent" to the executing agents, in conformance with *Horton's* requirements. it appears eighteen such documents were seized and offered into evidence.

We think this is a close question. *See Arizona v. Hicks*, 480 U.S. 321, 326 (1987). Just as the officer in *Hicks* could not, absent probable cause, upon glancing at a stereo, move it and look for a serial number, *id.* at 324-29, it may be argued that neither may an officer, upon glancing at a document noticeably beyond a search warrant, peruse it and look for incriminating evidence. As the D.C. Circuit observed in *United Stated v. Heldt*, a pre-*Hicks* case:

> The incriminating character limitation necessarily permits a brief perusal of documents in plain view in order to determine whether probable cause exists for their seizure under the warrant. If in the course of that perusal, their otherwise incriminating character becomes obvious, they may be seized. *Otherwise, the perusal must cease at the point at which the warrant's inapplicability to each document is clear.*

668 F.2d 1238, 1267 (D.C. Cir. 1981)(per curiam)(internal citations and parenthetical quotations omitted)(emphasis added), *cert. denied*, 456 U.S. 926 (1982).

This is not a case in which the officers merely perused the documents to determine whether they fell within the scope of the search as specified by the search warrant; their immediate observation of the contested documents revealed that the documents fell outside the warrant. The government concedes the agents had to use their own discretion in perusing these papers to determine whether they were incriminating. As the Supreme Court observed in *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976):

> [T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. ...[R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

This court, in *United States v. Issacs*, 708 F.2d 1365 (9th Cir.), *cert. denied*, 464 U.S. 852 (1983), upheld an officer's perusal of a ledger "in no more thorough a manner than necessary to determine whether it contained the items which were the object of the search warrant," *id.* at 1369, stating in summary:

> These cases make clear that when conditions justify an agent in examining a ledger, notebook, journal, or similar item, he or she may briefly peruse writing contained therein. The justification

> may arise from a reasonable suspicion to believe that the discovered item is evidence ...; or it may arise from the authority conferred by a warrant to search for certain items which might reasonably be expected to be found within such a book, as here. In either case, the plain view doctrine would permit brief perusal of the book's contents and, consequently, its seizure if such perusal gives the examining agent probably cause to believe that the book constitutes evidence.
>
> We do not mean to suggest that agents entitled to examine a book or similar item may minutely scrutinize its contents, especially when personal, nonbusiness papers are involved. But this case does not require us to explore the limits to brief perusal. The trial court's factual findings establish that no more than a glance was necessary to ascertain the incriminating nature of the notations.

Id. at 1370 (internal citations and quotations omitted).

In the present case, we are troubled by the fact that, although the warrant limited the search to records post-dating May 1992 and pertaining to the Unity House fraud, the agents nonetheless seized documents beyond the scope of the warrant. it would have been readily apparent to the government agents that the documents seized pre-dated May 1992. In examining these documents, therefore, the agents were immediately alerted to the fact that the documents were beyond the warrant's scope. More difficult is the question of whether these documents were on their face incriminatory. *Compare United States v. Menon*, 24 F.3d 550, 559-61 (3d Cir. 1994)(upholding plain view seizure of documents beyond warrant where seizing agents' collective knowledge gave them probable cause to believe trigger words such as "Jabeco," the name of a company with which defendant allegedly engaged in criminal activity, and "reprocessing" indicated that the documents evidence illegal activity), *with United States v. Soussi*, 29 F.3d 565, 572 (10th Cir. 1994)(permitting cursory review of documents pre-dating warrant by ten months, but remanding for factual finding to determine whether the incriminating character of the documents was "immediately apparent during the cursory review"); and *United States v. Hinckley*, 672 F.2d 115, 132 (D.C. Cir. 1982)(per curiam)(rejecting argument that officer's observation, during lawful search for contraband, of piece of paper containing trigger words "prison," "life sentence," and "cooperation with the Justice Department," justified reading the entire document), *overruled in part on other grounds, Hudson v. Palmer*, 468 U.S. 517 (1984).

[19] We assume *arguendo* that the searches for and seizures of these eighteen documents were not justified by the plain view doctrine, and therefore that they were illegally seized. This evidence was only material, however, to the testimony of Norman Frank and Brian Ajifu, as it pertained to Mew's prior fraudulent schemes. As we have held that this evidence was properly received under Fed. R. Evid. 404(b), we also note that the trial involving all of the defendants lasted for over one month. The other documentary and testimonial evidence pertaining to the Unity House fraud, including that implicating Mew, was overwhelming. The evidence pertaining to Mew's prior involvement with IBI, ADR, Norman Frank, and Brian Ajifu was *de minimis* in comparison to the evidence directly relevant to the particular offenses for which the defendants were tried.

[20] We therefore find, even assuming the Mew's Fourth Amendment rights were violated, that the evidence admitted as a result of the illegal search did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'" *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

CONCLUSION

The judgment of conviction of each of the defendants and the sentencing of the district court are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee) No. 95-30198
v.) D.C. No.
) CR-94-05246-3-FDB
MORREON B. RUDE,)
Defendant-Appellant.)

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) No. 95-30205
v.) D.C. No.
) CR-94-05246-01-FDB
STAFFORD Y.L. MEW,)
Defendant-Appellant.) ORDER, DENIAL
) OF PETITION FOR
) REHEARING,
) REJECTION OF
) SUGGESTION FOR
) REHEARING EN
) BANC, AND
) AMENDED
) OPINION
)

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,) No. 95-30207
v.)
) D.C. No.
CHARLES E. ANDREWS,) CR-94-05246-06-FDB
Defendant-Appellant.)

UNITED STATES OF AMERICA,) No. 95-30208
Plaintiff-Appellee,)
v.) D.C. No.
RODNEY H.S. KIM) CR-94-05246-02-FDB
Defendant-Appellant.)

Appeals from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
May 6, 1996--Seattle, Washington

Filed July 10, 1996
Amended September 10, 1996

Before: Donald P. Lay,[*] Eugene A. Wright
and Edward Leavy, Circuit Judges.

Opinion by Judge Lay

SUMMARY

CRIMINAL LAW AND PROCEDURE/WHITE COLLAR CRIMES

The court of appeals affirmed district court judgments of conviction and sentence. The court held, among other things, that evidence was sufficient to sustain wire fraud counts, where funds

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[*] Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

were transferred from one bank to another after an initial wiring of funds and some funds were returned to an investor.

At a trial on charges of wire fraud, money laundering, and conspiracy, the government adduced evidence that appellants Morreon Rude, Stafford Mew, and Rodney Kim conspired to induce investments in "prime bank note" transactions. Evidence indicated that they made false representations regarding, among other things, whether investments would remain in the investors' own accounts. Evidence indicated that a scheme began when Rude and Mew incorporated North Pacific Investments, Inc. (NPI) as a means of perpetrating fraudulent activities. Representatives of Unity House agreed to invest in the notes. Mew and Unity's president signed a Limited Power of Attorney and a Private Participation Agreement, each prepared by Kim, authorizing an arrangement under which NPI was given a general power of attorney in order to transfer funds out of an account at Credit Suisse in Geneva, Switzerland. Unity transferred $10 million to the Credit Suisse account. Mew effected transfers of all $10 million from Credit Suisse to NPI's account at Seafirst Bank. Unity's president received a letter from Mew stating that NPI was holding $625,000 in earnings for Unity, and Rude transferred $650,000 to Unity. Unity was not aware that the money was simply part of its original investment. It understood the payment as a return on its investment. Mew and Rude also transferred $2 million to a discretionary account from which appellant Charles

Andrews traded. The defendants had never purchased any prime bank notes or letters of credit.

Andrews, who had been charged with making a false declaration to a grand jury, had entered a plea to that charge in exchange for his agreement to cooperate in the prosecution of the other defendants. In the grand jury testimony, Andrews failed to disclose the number of times he had met Mew, in an effort to conceal the fact that he and Mew had been in Switzerland to set up the Credit Suisse account. A jury convicted the remaining defendants on all counts. Rude, Kim and Mew appealed their judgments of conviction. Andrews appealed his sentence.

[1] A Sentencing Guideline requires only that the defendants' perjury be "in respect to a criminal offense" for certain cross-referencing to be justified. [2] In this case, facts demonstrated that Andrews' perjury was "in respect to" the other defendants' money laundering offenses. There was no error in the district court's sentencing of Andrews.

[3] It was clear that the $650,000 wire transfer, as well as the transfers from Credit Suisse to Seafirst were at a minimum either "incident to an essential part of the scheme," or "a step in [the] plot." The moneys returned to Unity were intended to create the impression that Unity was earning an immediate, substantial return on its investment. [4] The fraud was not complete until the $10 million deposited in Credit Suisse was within the defendants' complete control. Although effecting a transfer to Credit Suisse was a step in the scheme, the final steps did not occur until the

defendants effected transfers to and from the Seafirst account. The evidence was sufficient to sustain the wire fraud counts.

[5] A review of the record evidence showed that Rude specifically intended to participate in the conspiracy. [6] Viewing evidence in the light most favorable to the government, Kim clearly intended to further the fraudulent scheme.

[7] There was no prejudicial variance between the Superseding Indictment and the evidence adduced by the government. The Superseding Indictment charged a scheme to defraud investors, including Unity, through investments involving the purchase and sale of prime bank debt obligations. It was clear that the Unity solicitation was part of a single broad scheme of fraud that took place over a roughly two-year period.

[8] Jury instructions required both a unanimous finding concerning the existence of the underlying false statements and a specific finding that the scheme found matched that charged in the Superseding Indictment. Those instructions were proper.

[9] The defendants alleged that the prosecutor's opening statement was peppered with inflammatory jingles such as "scam," "victim," and "con." They maintained that prejudicial conduct persisted throughout the trial, including the prosecution's statements in closing argument. They suggested the prosecutor, among other things, referred to them as "crooks" or "evil" at least 11 times and used terms or phrases such as "con man," "charlatans," "trolling around for victims," "lie," "lies," or "lied" over 90 times. [10] However, viewed in its entirety and in the

context of the month-long trial, the government's choice of terms and phrases was not overly repetitious, and in fact reasonably described defendants' practices. There was no prejudicial error in the allowance of the prosecution's statements in closing argument.

[11] Although a witness extended his hand to the prosecutor, research revealed no case suggesting it is improper for a prosecutor, without more, simply to shake hands with a witness upon the close of his testimony in the jury's presence.

[12] At trial, two witnesses testified concerning Mew's alleged prior fraudulent practices, [13] and the admission of that evidence withstood a relevant analysis relating to the admissibility of prior bad acts evidence. The testimony was relevant, [14] and reliable. The alleged schemes were strikingly similar to the charged offenses, as each involved "prime bank" notes and related instruments, and each involved promises of high rates of return. [15] The fact that the alleged prior acts occurred seven and eight years earlier was not troubling.

[16] A search warrant issued in the case authorized the seizure of certain documents dating from May 1992 and pertaining to the defendants and NPI. [17] That warrant was sufficiently specific. [18] The government conceded that agents seized several documents pre-dating May 1992, but urged that those documents were properly seized under the "plain view" doctrine. [19] Even assuming the searches for and seizures of certain documents were not justified by the plain view doctrine, that evidence was only material to the testimony of the two witnesses as it pertained to

Mew's alleged prior fraudulent schemes. [20] Evidence admitted as a result of any illegal search was harmless beyond a reasonable doubt.

COUNSEL

Charles A. Johnston, Felker, Lazares & Johnston, Tacoma, Washington, for defendant-appellant Rude; Ronald G.S. Au, Honolulu, Hawaii, for defendant-appellant Mew; Stephen E. Robinson, Fleeson, Gooing, Coulson & Kitch, Wichita, Kansas, for defendant-Appellant Andrews; Ronald D. Ness, Port Orchard, Washington, for defendant-appellant Kim.

Robert M. Westinghouse and Carl Blackstone, Assistant United States Attorneys, Seattle, Washington, for the plaintiff-appellee.

ORDER

The opinion filed July 10, 1996, is amended as follows:

Slip opinion at page 8332, delete paragraph [20]: "We therefore find, even assuming... ."; and substitute the following:

> We therefore find, even assuming that Mew's Fourth Amendment rights were violated, that the evidence admitted as a result of the illegal search was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).[1]

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[1] In *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), The Supreme Court for the first time rejected the harmless error rule of *Chapman v. California*, 386 U.S. 18, 24 (1967), in collateral attack cases involving constitutional trial error. The *Brecht* Court held that, where there is

With this amendment, the panel has voted to deny the petition for rehearing. Judge Leavy has voted to reject the suggestion for rehearing en banc, and Judges Lay and Wright have so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

LAY, Circuit Judge:

These consolidated appeals involve a scheme to defraud investors, including Unity House, Inc., a Hawaii non-profit

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constitutional trial error, the petitioner must hsow actual prejudice under the "'subtantial and injurious effect'" rule in order to obtain a reversal. 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 760, 776 (1946)). In other words, the petitioner may no longer succeed by showing a mere reasonable possibility of prejudice. *Id.* Until *Brecht* was decided, however, the Court had regularly applied the *Chapman* rule to constitutional trial error in collateral attack cases. *See, e.g., Rose v. Clark*, 478 U.S. 570, 576-77 (1986); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970). The standard applied in the latter cases now appears to be overruled by the *Brecht* decision. Until the *Brecht* decision, the *Kotteakos* standard, grounded in the federal harmless error rule under 28 U.S.C. § 2111, had been limited to trial error of non-constitutional questions. Although there is language in the *Brecht* case, *see* 507 U.S. at 631 n.7, which indicates that § 2111 is more amenable to the harmless error review of constitutional violations, we know of no case which substitutes the *Brecht* rule of actual prejudice for the less stringent rule of *Chapman* on direct appeal.

corporation, of several million dollars. Morreon B. Rude, Rodney H.S. Kim, and Stafford Mew appeal their judgments of conviction for wire fraud, money laundering, and conspiracy. Charles Andrews, who pleaded guilty to one count of testifying falsely before a grand jury in exchange for cooperation in the prosecution of the other defendants, appeals his sentence. We affirm.

THE "PRIME BANK NOTE" SCHEME

At trial the government adduced evidence that the defendants conspired to induce investments in what they termed "prime bank note" transactions.[2] The subject transactions were described to potential investors as a form of international bank paper purchased from issuing banks at a discount and sold to wholesale banks for a profit. Defendants held themselves out as persons experienced in such transactions and assured potential investors that the notes would yield monthly returns of roughly two to five percent. They further represented that the investments would not be at risk and in fact would remain in the investors' own accounts. Each of these representations was false.

The scheme began in May 1992, when Morreon Rude and Stafford Mew incorporated North pacific Investments, Inc. ("NPI"), a Washington corporation, as a means of perpetrating defendants' fraudulent activities.

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[2] The government maintains that the very notion of a "prime bank note" transaction if fictitious.

In December 1992, after several furtive attempts to sell the notes to third parties, representatives of Unity House, a Hawaii non-profit company with assets of more than $50 million, agreed to invest $10 million in the notes. They asked Roderick Rodriguez, the executive director of Unity House, to contact Bank of America to obtain a letter of credit, but Bank of America declined. Mew, NPI's principal, offered to procure a letter of credit from a European bank on behalf of Unity House. Mew represented that an account for Unity House could be opened at Credit Suisse in Geneva, Switzerland, and that the money would remain in the bank earning interest. The representatives of Unity House accepted Mew's proposal. Anthony Rutledge, the president of Unity House, and Mew signed a Limited Power of Attorney and a Private Participation Agreement, each prepared by Kim, authorizing the arrangement, whereunder NPI was given a general power of attorney in order to transfer funds out the Credit Suisse account. Mew then enlisted the help of Charles Andrews, a commodities broker with a seat on the Chicago Mercantile Exchange, who met him in Geneva, Switzerland to establish the account. On January 19, 1993, Unity House transferred $10 million to the Credit Suisse account.

Between February and April 1993, Mew effected transfers of all $10 million from Credit Suisse to NPI's account at Seafirst Bank. In April, Rutledge received a letter from Mew stating that NPI was holding $625,000 in earnings for Unity House, and in July 1993 Rude transferred $650,000 to Unity House. Unity House was not aware, however, that the money was simply part of its original investment; it understood the payment as a return on its investment, and in fact did not learn of NPI's activities until September 1993, when Rutledge was interviewed by law enforcement agents. In addition, Mew and Rude transferred $2 million to a discretionary account from which Andrews traded until November, when the remaining $350,000 was seized. Andrews received $400,000 in commissions during the course of the trading, and the balance of that $2 million was lost. Another substantial portion of the money was deposited in various accounts and used to trade stocks and commodities, generating losses of approximately $3,667,000. Federal agents seized most of this money. Of the remaining funds, Mew and Rude together received $588,538; Kim received $106,666; and Gonzales received $792,000. The defendants never purchased any prime bank notes or letter of credit, though they maintain that they attempted to do so.

Law enforcement investigations led to a grand jury proceeding in August 1993. Rude then first admitted that Unity House was the source of the $10 million transferred to NPI's Seafirst account. He claimed the money was a loan, and records he produced referred to the transaction a such. In November 1993, federal agents seized the funds in NPI's various accounts. Kim, Rude, Mew, and Jack Gonzales[3] were indicted on April 20, 1994.

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[3] Gonzales too was convicted, but he is not a party to this appeal.

Andrews appeared before a grand jury in Seattle on December 15, 1993. During his testimony, he failed to disclose the number of times he had met Mew, in an effort to conceal the fact that he and mew had been in Switzerland to set up the Credit Suisse account. On September 14, 1994, the grand jury returned a superseding indictment charging Andrews, along with Mew, Kim, and Gonzales, with conspiracy, wire fraud, and money laundering. Andrews was also charged with making a false declaration to the grand jury. He later admitted that he had testified falsely and entered a plea to that charge in exchange for his agreement to cooperate in the prosecution of the other defendants.[4] The remaining four defendants proceeded to trial, and a jury convicted them on all counts on march 21, 1995. Kim, Rude, and Mew were sentenced on June 9, 1995.[5]

CHARLES ANDREWS

Andrews argues that the district court erred in the imposition of his sentence by failing to make factual findings requisite to the application of U.S.S.G. § 2J1.3(c)(1)(1994), which provides:

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[4] Andrews was sentenced to a 30-month term of imprisonment, to be followed by a three-year term of supervised release. As a condition of his supervised release, the court ordered him to make restitution to Unity House in the amount of $10 million. Pursuant to the plea agreement, the court dismissed the remaining charges against Andrews.

[5] Mew received a sentence of 236-months imprisonment, Kim received a sentence of 189-months imprisonment, and Rude received a sentence of 135-months imprisonment, each to be followed by a three-year term of suervised release. Like Andrews, the other defendants were order to pay restitution of $10 million to Unity House.

> If the offense involved perjury, subornation of perjury, or witness bribery in respect to a criminal offense, apply § 2X3.1(Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Andrews acknowledges that cross-referencing U.S.S.G. § 2X3.1 would have been appropriate had the district court found that he committed perjury "in respect to" the criminal offense of money laundering, for which his co-defendants were convicted, but suggests the court applied § 2X3.1 notwithstanding its failure to make such a finding, thus violating both § 2J1.3 and Fed. R. Crim. P. 32(c)(3)(D). Although he objected to the presentence investigative report's characterization of the facts, he suggests the court simply deferred to the probation officer's recommendation to cross-reference § 2X3.1 without addressing his objections.

Contrary to Andrews' claim, we find that the district court was aware that it needed to make such a finding, and that it did so. *See* Excerpts of Record D at 28 ("[T]hat will be my finding, that the offense level will be based on that cross reference."). Rule 32(c)(1) does not require the court to articulate the reasoning for its finding. *See United States v. Karterman*, 60 F.3d 576, 583 (9th Cir. 1995); *United States v. Fagan*, 996 F.2d 1009, 1016 (9th Cir. 1993); *United States v. Peters*, 962 F.2d 1410, 1415 (9th Cir. 1992). Although the court did not articulate the facts upon which it relied in ruling as it did, we are satisfied that the requisite finding was made.

[1] The remaining issue is whether the court's finding that Andrews committed perjury in respect to the money laundering offenses of his codefendants was justified. U.S.S.G. § 2J1.3(c)(1) required only that the defendant's perjury be "in respect to a criminal offense" for cross-referencing to be justified. The Guideline requires neither that the defendant have committed perjury in respect to his *own* criminal offense, nor that he have committed perjury in respect to an *adjudicated* criminal offense. Provided an indictment and conviction are forthcoming, as they were here, and so long as the defendant knew or had reason to know, at the time of his perjury, that his testimony concerned such a criminal offense, the "in respect to" element of § 2J1.3(c)(1) is satisfied.

[2] At the time of his perjured testimony, Andrews knew that Mew was under investigation for money laundering and wire fraud, as verified by a memorandum he prepared and sent to Mew following his interview with federal agents, and the seizure warrant itself, which detailed the factual basis for the forthcoming allegations. Andrews also know that Mew did not want him to tell the grand jury about the credit Suisse account -- a fact which belies his claim that he thought the charges arose from a legitimate business transaction. These facts demonstrate that Andrews' perjury was "in respect to" the other defendants' money laundering offenses. We find no error in the district court's sentencing of Andrews.

RUDE, KIM, AND MEW

Rude, Kim, and Mew jointly and individually have raised various claims on appeal. They challenge (1) the sufficiency of the evidence to sustain their convictions; (2) the legal sufficiency of the Superseding Indictment and the government's variance therefrom; (3) multiple aspects of the jury instructions; and (4) the conduct of the prosecution during trial.[6] Mew raises separate claims that the district court erroneously (1) admitted evidence of other crimes involving fraudulent misconduct under Fed. R. Evid. 404(b); (2) denied his motion for a continuance; and (3) denied his motion to suppress evidence which was allegedly illegally seized from his residence.

THE SUFFICIENCY OF THE EVIDENCE

Defendants claim that the evidence was insufficient to support their wire fraud convictions, under Counts One through Five, for violating 18 U.S.C. § 1343. They observe that they were not charged with wire fraud for the *initial* wiring of funds from Hawaii to Credit Suisse, but rather for the transfers of funds from Credit Suisse to Seafirst Bank, and for returning funds to Unity House in the sum of $650,000. Defendants maintain that the latter transfers were not in furtherance of the fraud, as the wire fraud was completed at the point when Unity House wired $10 million from Hawaii to Credit Suisse. If the wire fraud counts cannot be sustained, their argument continues, their convictions for money laundering and conspiracy must also be overturned, since the latter counts were dependent upon the underlying wire fraud convictions. In support of these contentions, defendants rely upon *United States v. Lane*, 474 U.S. 438 (1986), *United States v. Maze*, 414 U.S. 395 (1974), and *Kann v. United States*, 323 U.S. 88 (1944).

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[6] Each of the parties relies on Fed. R. App. P. 28(I) and adopts by reference the claims in one another's briefs. To avoid confusion, we discuss the claims as if they are applicable to all three defendants, except where otherwise noted.

[3] The defendants' argument is without merit, for it is clear that the $650,000 wire transfer, as wells as the transfers from Credit Suisse to Seafirst, the defendants' bank, were at a minimum either "incident to an essential part of the scheme," or "a step in [the] plot." *See Schmuck v. United States,* 489 U.S. 705, 711 (1989)(quotations omitted)(alteration in original). The moneys returned to Unity House, for example, were intended to create the impression that Unity House was earning an immediate, substantial return on its investment, as promised by the defendants. This transfer therefore was not only relevant to the fraudulent conspiracy, but extended the overall scheme by "'lull[ing] the victims into a false sense of security, postpon[ing] their ultimate complaint to the authorities, and therefore mak[ing] the apprehension of the defendants less likely than if no [transfers] had taken place.'" *See Lane*, 474 U.S. at 451-52(quoting *Maze*, 414 U.S. at 403); *see also United States v. Sampson*, 371 U.S. 75, 80-81 (1962). The instant case is distinguishable from the fraudulent credit card scheme involved in *Maze*, where the goods were immediately obtained by the fraud, and where parties other

than the defendants completed the underlying mail transfers. *See* 414 U.S. at 402-05.

[4] Regarding the transfers from the Credit Suisse account to Seafirst, the defendants overlook the fact that their fraud was not complete until the $10 million deposited in Credit Suisse (in Unity House's account) was within their complete control. Unity House was falsely promised that its money would remain in the Credit Suisse account. Although effecting a transfer to Credit Suisse was a step in the scheme, the final steps did not occur until defendants effected transfers to and from the Seafirst account, thus placing the funds outside of Unity House's account, outside of the scope of Unity House's authorization, and within their own control. *See United States v. Sindona*, 636 F.2d 792, 802 (2d Cir. 1980) ("A scheme to defraud is not complete until the proceeds have been received and use of the mail or wires to obtain the proceeds satisfies the jurisdictional element."), *cert. denied*, 451 U.S. 912 (1981). Thus, we find the evidence sufficient to sustain the wire fraud counts.

Specific Intent

Rude suggests the only evidence offered to prove that he possessed the requisite specific intent to defraud concerned his acts in arranging the $650,000 wire transfer to Unity House and in wiring notes of corporate minutes unrelated to the case. We have already rejected Rude's argument that the wire transfers to and from the Seafirst account, including the transfer to Unity House, were not part of the scheme to defraud. As to his claim that his involvement was otherwise limited to wiring corporate minutes, a review of the record does not support this assertion.

[5] The prosecution presented evidence that Rude: acted as the front man who incorporated NPI; opened bank and brokerage accounts; at least once lied concerning the corporation's equity and income; structured transactions through the accounts he established to avoid filing Currency Transaction Reports; concocted board minutes; wire a portion of Unity House's own money back to it as a purported return on their investment, knowing that no return had been earned; transferred several millions to other accounts and to himself; and falsely stated to law enforcement authorities and a federal grand jury that NPI simply had invested its own funds. A review of the record evidence plainly shows that Rude specifically intended to participate in the conspiracy.

Kim contends that there is no support for the prosecution's repeated assertions that he was more than the attorney who drafted the Limited Power of Attorney and Private Participation Agreement in the Unity House transaction. He suggests he lacked knowledge of the five bank wires comprising the bases for the charges and, like Rude, maintains that proof of specific intent may not be based on constructive knowledge of facts known to others.

[6] We disagree. On several occasions, Kim solicited prime bank note transactions; falsely claimed to have learned the trade while seeking funding for a client in Europe in the 1980s' and represented that the prime bank notes would yield absurdly high

returns. He assured that the deal with Unity House would close by preparing the Private Participation Agreement and Limited Power of Attorney, which falsely represented that NPI was experienced in prime bank not transactions. He also structured the conversion of a portion of currency checks payable to Mew and, finally, offered Roberta Cabral, a Unity House marketing agent, a bribe to take responsibility for false promises made in one of NPI's subsequent, unsuccessful prime bank note presentations. Viewing this evidence in the light most favorable to the government, Kim clearly intended to further the fraudulent scheme.

THE SUPERSEDING INDICTMENT

The defendants' initial challenge to the legal sufficiency of the superseding indictment is similar to their challenge to the sufficiency of the evidence. As recited above, defendants claim that the fraudulent scheme was complete once Unity House wired the $10 million to the Credit Suisse bank account established in Unity House's name and that, in consequence, the wirings of the $10 million to NPI's Seafirst account were not in furtherance of the scheme and therefore not actionable. Rude and Kim urge that Stafford Mew was the sole signatory with a general Power of Attorney on Unity House's account, and suggest there is no evidence to show that they even knew of those documents or the limited transfer from Unity House to Credit Suisse. The defendants, however, took integral steps in the fraudulent scheme when they effected transfers of money from Credit Suisse to their

Seafirst account in the state of Washington. We thus reject this contention.

[7] The defendants also assert that there was a prejudicial variance between the charges against them and the proof offered at trial. The Superseding Indictment charged a scheme to defraud investors, including Unity House, through investments involving the purchase and sale of prime bank debt obligations. it is clear that the Unity House solicitation was part of a single broad scheme of fraud which took place over a roughly two-year period. We find no prejudicial variance between the Superseding Indictment and the evidence adduced by the government.

Along the same line, the defendants claim that the Superseding Indictment was multiplicitous because they were punished twice for the same offense. They assert that the money laundering Counts, Six through Eleven, are merely a relabeling of the five bank wirings charged in the wire fraud Counts, One through Five. We find no merit to this claim. An indictment is multiplicitous if it charges a single offense in several counts. *See e.g., United States v. UCO Oil Co.,* 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied,* 115 S. Ct. 250 (1994); *United States v. Piervinanzi,* 23 F.3d 670, 680 (2d Cir.), *cert. denied,* 115 S. Ct. 259 & 267 (1994); *see also United States v. Edgmon,* 952 F.2d 1206, 1214 (10th Cir. 1991), *cert. denied,* 505 U.S. 1223 (1992).

JURY INSTRUCTIONS

The defendants raise several challenges to the district court's jury instructions. Specifically, they claim that the court erred in failing to instruct the jury concerning a single scheme to defraud; in instructing the jury that the defendants need not have succeeded in obtaining money or property or in causing others to lose money through their scheme; in instructing the jury on aiding and abetting liability; and in shifting the burden of proof from the prosecution to the defense.[7]

Single Scheme to Defraud

Defendants argue that the court erred in failing to instruct the jury concerning the requirement that they find a single scheme to defraud, as alleged in the indictment. They rely on *United States v. Mastelotto*, 717 F.2d 1238, 1247 (9th Cir. 1983), which held:

> In a ... wire fraud case in which a defendant contends that a variance has occurred between the single scheme charged in each count of the indictment and the proof at trial, the jury must be instructed that each of the jurors must find the defendant guilty of participation in the same single scheme to defraud *and* that the scheme to defraud in which the defendant is found to have participated is the same scheme as the overall fraudulent scheme alleged in the indictment.

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[7] The government asserts that the defendants failed to object to the instructions at the time of the trial, as required by Fed. R. Crim. P. 30. Rude concedes that he did not object, and we can find no objection by Mew. Kim, however, asserts that a number of objections were timely made and that all defendants joined in the objections. Notwithstanding the dispute over whether the defendants properly objected (and our reading of the transacript verifies that the defendants failed properly to object to most of the instructions contested on appeal), we nonetheless have reviewed these instructions and find no prejudicial error.

> If the jurors are not instructed that they must all agree on the existence of the same scheme to defraud, the defendant's right to a unanimous jury verdict as guaranteed by article III, § 2 of and the sixth amendment to the United States Constitution is infringed.

Defendants assert that Instructions 16, 17, 18, and 22, which pertain to the charges of a scheme, failed to meet this standard.

[8] We find that the instructions were proper and did not deprive the defendants of their constitutional rights. Although, as we have concluded, the Superseding Indictment charged and the proof offered supported a finding of a single scheme, Instruction 16 stated in relevant part:

> In order for a defendant to be found guilty of [wire fraud], the Government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant made up a scheme or plan to defraud individual and organizational investors, including Unity House, Inc., and to obtain money from the investors by means of false promises or statements, *with all of you agreeing on at least one particular false promise or statement that was made;* ....

(Emphasis added.) Instruction 18 stated:

> The scheme to defraud charged in the Superseding Indictment is made up of various acts. it is not necessary for the Government to prove all of them, as long as sufficient evidence is shown to establish beyond a reasonable doubt that the scheme, *substantially as charged*, was set up.

(Emphasis added.) Thus, the instructions required both a unanimous finding concerning the existence of the underlying false statements and a specific finding that the scheme found matched that charged in the Superseding Indictment. We find these instructions proper.

The Successfulness of the Scheme

Defendants also challenge Instruction 22, which stated:

> It is not necessary for the Government to prove that the defendants were actually successful in obtaining money or property by means of false or fraudulent pretenses, representations, or promises. it is not necessary for the Government to prove that anyone lost any money or property as a result of the scheme or plan.
>
> An unsuccessful scheme to defraud is as illegal as a scheme or plan that is ultimately successful.

This instruction correctly states the law, in that the mail and wire fraud statutes do not proscribe only *successful* schemes. *See, e.g., United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991).

Aiding and Abetting Liability

Defendants next challenge Instructions 24 and 34, which instructed the jury concerning aiding and abetting liability. They assert that this was plain error, as no defendant was separately charged with aiding and abetting under 18 U.S.C. § 2.

We disagree. Each of the wire fraud and money laundering Counts charged violations of 18 U.S.C. § 2. Moreover, it is well settled that "aiding and abetting are implied in every indictment" for a substantive offense. *United States v. Armstrong*, 909 F.2d 1238, 1242 (9th Cir.), *cert. denied*, 498 U.S. 870 (1990).

Burden of Proof

Finally, defendants contend that Instructions 28-31 and 34-37, read together, effectively shifted the burden of proof from the government to them. Defendants' arguments are unsupported by any authority and fail to delineate the manner in which they were prejudiced. We have reviewed them individually and as a whole, and we find no prejudicial error. Those instructions containing the substantive elements of the offenses charged *each* state, in no uncertain terms, that the government bore the burden of proving its case "beyond a reasonable doubt."

THE PROSECUTORIAL MISCONDUCT CLAIMS

The defendants urge that they were deprived of a fair trial by prosecutorial misconduct.

Inflammatory Language

[9] The defendants first allege that the prosecutor's opening statement was peppered with inflammatory jingles such as "scam," "Ponzi Scheme," "gibberish," "victim," "outlandish," "charlatan," "con," "deceit," "misrepresentation," "falsehoods," "fool's mission," "fictitious business entity," "store front office," and "front person." They acknowledge that each statement itself may have been harmless, but suggest that their cumulative effect crossed the line between permissible oratorical tactics and comments calculated to incite jury prejudice. They maintain that this prejudicial conduct persisted throughout the trial, including

the prosecution's statements in closing argument. They suggest the prosecutors referred to the defendants as "crooks" or "evil" at least eleven times; used terms of phrases such as "con man," "charlatans," "trolling around for victims," :"lie," "lies," or "lied" over 90 times; and also used words such as "Ponzi Scheme," "practicing their craft," "perfecting their craft," and "victim."

The parties dispute whether defendants objected to the government's use of inflammatory words at trial.[8] Resolving this issue in the defendants' favor, we nonetheless conclude that the district court did not abuse its discretion in failing to grant a mistrial (which was not requested by the defendants) or in sustaining any objection. The district court specifically found that "[t]he opening and closing remarks, while containing an element of righteous indignation, were within the boundaries of proper openings and summations." We agree. The terms "victim," "deceit," "misrepresentation," "falsehoods," "fictitious business entity," "outlandish," "gibberish," and even "charlatan" and "scam," for example, are not even properly characterizable as slang.[9] Moreover, the law permits the prosecution considerable latitude to strike "hard blows" based on the evidence and all reasonable inferences therefrom. *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 330 (1994).

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[8] The government maintains that the defendants made no objection, but the defendants note that they objected twice during opening statement, once during trial, and once during closing argument. They also note that objections or motions raised by one defendant were automatically joined by the others.

[9] The dictionary defines "scam" as "afraudulent or deceptive act or operation." Webster's Ninth New Collegiate Dictionary 1047 (1984). It defines "charlatan" as "one making usu. showy pretenses to knowledge or

[10] Viewed in their entirety and in the context of the month-long trial below, the government's choice of terms and phrases was not overly repetitious, and in fact reasonably described the practices of defendants. As noted in *Guam v. Torre*, 68 F.3d 1177, 1180 (9th Cir. 1995), "there is no rule of evidence or ethics that forbids the prosecutor from referring to the crime by its common name when examining a witness. There is no rule requiring the prosecutor to use a euphemism for it or preface it by the word 'alleged.'" *See also United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995)(upholding prosecution's reference to defendant as "'the imminent source of evil in this courtroom--at this moment'"); *United States v. Taxe*, 540 F.2d 961, 968 (9th Cir. 1976)(upholding in fraud case use of terms "fraud," "scavenger," "parasite," and "professional con-man"), *cert. denied*, 429 U.S. 1040 (1977). although there is a point at which prosecutorial comments are no longer reasonably descriptive and therefore serve no purpose other than to incite prejudice in the jury, the prosecution did not cross that point here, and we decline to impose formalistic restrictions on its vocabulary. For this reason, we also

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ability: FRAUD, FAKER," *Id.* at 228. These are just the kinds of fraudulent acts the government indicted and proved.

find no prejudicial error in the allowance of the prosecution's statements in closing argument.

The Charge of Mischaracterization

The defendants also allege that the government mischaracterized their activities by implying that trading in prime bank notes was a wholly fictitious concept, despite the contrary testimony of its own witness, Agent Steven Studhalter, who defined the term "prime bank."

It is true that the prosecution may neither "assume prejudicial facts not in evidence," nor "insinuate the possession of personal knowledge of facts not offered in evidence." Torre, 68 F.3d at 1179-80. Here, however, the government presented other testimony from which the jury could conclude beyond a reasonable doubt that the very notion of a "prime bank note" was fictitious. Neal Aoki, an attorney employed by the Hawaii Securities Enforcement Unit, testified that the term "prime bank" had no meaning in the financial industry and was commonly associated with fraud schemes. A juror could reasonably infer from this testimony that defendants' business activities were a front. We thus cannot conclude that the government made prejudicial claims not supported by evidence.[10]

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[10] The defendants also argue that the government repeatedly referred to gambling, in violation of the court's pre-trial orders. The court ruled such statements admissible, however, provided the government could tie the fraud proceeds to gambling. Viewed in the light most favorable to the government, the evidence supports the allegation that the proceeds were tied to gambling.

Vouching

Defendants' final allegation of prosecutorial misconduct is a claim of impermissible prosecutorial vouching. The prosecution openly greeted a witness passing in front of the jury box. Rude's counsel objected, but the court simply admonished the prosecution; it did not provide curative instructions to the jury. The defendants suggest this was impermissible vouching and grounds for reversal.[11]

[11] This argument misconceives the doctrine of vouching, which applies where the prosecutor personally assures the jury concerning a witness's credibility or expresses a personal opinion regarding the defendant's guilt. *Cf. United States v. Williams,* 989 F.2d 1061, 1071 (9th Cir. 1993); *United States v. Necoeachea,* 986 F.2d 1273, 1276 (9th Cir. 1993). In fact, only one witness extended his hand to the prosecutor, and our research revealed no case suggesting it is improper for a prosecutor, without more, simply to shake hands with a witness upon the close of his testimony in the jury's presence. A prosecutor's open handshake with a witness neither lends governmental imprimatur to his testimony nor personally assures the jury of its credibility.

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[11] Defendants also claim that the United States engaged in improper vouching by presenting two pie charts to the jury which demonstrated the disposition of the fraud proceeds. This court has recognized, however, that the government may, in a fraud case, prove that the defendants did not use the funds obtained for thier intended purpose. *See United States v. Brutzman,* 731 F.2d 1449, 1452 (9th Cir. 1984)("The misuse of the funds directly established the fraudulent nature of the scheme."). A different result is not required simply because the government used pie charts to this end.

404(b) EVIDENCE

[12] Mew asserts that the court erred in refusing to grant his motion to exclude evidence of other fraudulent transactions relating to him and dating back to 1986. At trial, two witnesses, Brian Ajifu and Norman Frank, testified concerning Mew's prior fraudulent practices. Ajifu testified that he was enticed to invest $50,000 in a similar scheme by Mew's representation, through a company with which he associated, ADR Industires ("ADR"), that he would earn five times his investment within two or three months. Subsequently, when Ajifu told mew that he had contacted the FBI, mew told him not to say anything and to treat the invested funds as a loan. Frank likewise testified that, near the same time, Mew promised him a 25% return on his investment in three months. Frank initially invested $85,000, but when mew told him his investment had doubled, he invested another $50,000, all of which was lost. Mew acted through IBI Financial ("IBI"), another business entity, during this period. Prior to trial, Mew filed a motion in limine to exclude the testimony under Fed. R. Evid. Rule 404(b), which was denied. We review its denial for an abuse of discretion. *United States v. Luna*, 21 F.3d 874, 878 (9th Cir. 1994).

Mew suggests the testimony of Ajifu and Frank was irrelevant to the Unity House transaction, remote in time, and insufficient to support a finding that he committed the other acts. he also notes that this court "has specifically incorporated Rule 403's probative value/unfair prejudice balancing requirement into the Rule 404(b) inquiry," *United States v. Mayans*, 17 F.3d 1174, 1183 (9th Cir. 1994), and suggests the court below failed to conduct a Rule 403 analysis.

[13] The admission of this evidence withstands the four-part analysis of *United States v. Spillone*, 879 F.2d 514, 518-20 (9th Cir. 1989), *cert. denied*, 498 U.S. 864 & 878 (1990), which holds that prior bad acts evidence is admissible if it (1) tends to prove a material point; (2) is not too remote in time; (3) is sufficient to support a finding that the defendant committed the other act; and (4) in some cases, concerns an offense similar to that charged. The testimony was relevant to demonstrate defendants' fraudulent intent, as it established that Mew was not simply a highly optimistic, but negligent, investor. *See United States v. Sarault*, 840 F.2d 1479, 1485 (9th Cir. 1988); *United States v. Jenkins*, 785 F.2d 1387, 1395 (9th Cir.), *cert. denied*, 479 U.S. 889 (1986).

[14] We also find the challenged evidence reliable. Both Ajifu and Frank testified that Mew employed similar, fraudulent investment tactics, around the same period in time, to induce them to invest. Their testimony not only was specific concerning the nature of the transactions and the promised returns, but was corroborated by documentary evidence and sufficient to support a finding that Mew committed the alleged frauds. The schemes were strikingly similar to the charged offenses, as each involved "prime bank" notes and related instruments, and each involved promises of high rates of return. Nor were the prior acts too remote in time.

[15] Given the similarity and relevance of the offenses, we are not troubled by the fact that they occurred seven and eight years earlier. This circuit has not adopted a bright line rule concerning remoteness in time, *Spillone*, 879 F.2d at 519, and, where the prior acts were similar to those charged, previous decisions have upheld admission of evidence of acts up to twelve years old. *See United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989)(acts occurring twelve years ago not too remote), *cert. denied*, 494 U.S. 1083 (1990). As to Mew's claim that the court below failed to apply Rule 403, we note that the court specifically found that the probative value of the evidence "outweigh[ed] any prejudice which may be present." This argument is therefore meritless as well.

CONTINUANCE

Mew also contends that the district court erred in denying his request for a continuance. He asserts that he lacked time to prepare an adequate defense, given the massive production of exhibits and documents no more than 11 or 12 days prior to trial. This lack of time, and the case's complexity and his pre-trial detention, assuredly deprived him of a fair trial.

We review a trial court's ruling on a request for a continuance under an abuse of discretion standard. it is settled that we will reverse only if the decision is "arbitrary and unreasonable." *United States v. Tham*, 960 F.2d 1391, 1396 (9th Cir. 1991).

Although there was a concededly large volume of materials produced by the government in this case, the defendants were kept informed of this fact by three separate notices from the government. In addition, it provided an exhibit list two weeks prior to trial. *Jencks* materials were provided ten days before the first witness testified. *See Jencks v. United States,* 353 U.S. 657 (1957).

Furthermore, as the court recognized, a continuance would greatly have inconvenienced the government, the court, and out-of-state witnesses under subpoena. Nor has mew shown the particular manner in which he was prejudiced by the denial of a continuance: he has not suggested he would have done additional investigation based on the new discovery, or that he was unable to use the discovery in cross-examining witnesses or in presenting his defense. In the absence of any particular proof of prejudice, we cannot say the court below abused its discretion in denying the continuance, particularly since it perceived a threat of flight. Moreover, the trial court found that defendant's counsel "came into the case with the understanding that if you couldn't come in and pick up the baton and keep the race going, that this was not the case to come into. I believe your assurance to the Court was that that would be no problem." thus, we find no abuse of discretion.

THE FOURTH AMENDMENT CLAIMS

[16] Although each of the defendants' residences as well as the offices of NPI were searched, only Mew has standing to challenge the search of his residence.[12] The search warrant issued in the present case authorized the seizure of the following documents dating from May 1992 to the present and pertaining to the defendants and NPI:

> Business records ... Bank account records ... Brokerage account records ... Credit card record statements and payment records ... Records of domestic and foreign travel ... Records pertaining to potential victims and associates, to include, but not be limited to, telephone toll records, letters memos, correspondence, address books, diaries, photographs, video and audio recordings ... Currency and other valuable items, such as gold and jewelry, traceable to fraud and money laundering.

Mew asserts that the search warrant was overly broad in scope and failed to state with particularity any guidelines for the agents to determine objectively whether a document to be seized related to wire fraud or money laundering. He also argues that many of the documents seized by the government pre-dated May 1992, and that none of these documents pertained to NPI or to the Unity House fraud.

The Validity of the Warrant

While a search warrant must describe items to be seized with particularity sufficient to prevent "a general, exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)(plurality), it need only be "reasonably specific, rather than elaborately detailed," *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), and the specificity required "varies depending on the circumstances of the case and the type of items involved," *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

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[12] As earlier explained, the parties have attempted to incorporate by reference the arguments in each other's briefs. Neither Rude no Kim, however, has standing to challenge the search of Mew's residence. Conversely, Mew lacks standing to challenge the search of any other defendant's residence.

[17] The warrant here was sufficiently specific. As the district court noted, the warrant was limited to post-May 1992 documents, and to records pertaining to five individuals and one corporation. Any search for relevant documents is likely to retrieve *some* information that ultimately is beyond the core of evidentiary material produced at trial. An objective basis for distinguishing relevant documents from others is therefore necessary to ensure that the search is limited. Here, the specification of dates, individuals, and the NPI corporation, along with a reasonably precise delineation of the type of records sought, satisfied the specificity requirement. In *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991), this court upheld a warrant authorizing the search of an attorney's office for documents because the list of documents sought "was qualified by the requirement that the documents seized be 'in the name of or have reference to' [the defendant] or [the persons] or entities that had been linked to [the defendant] through the investigation." Such is the case here. Moreover, the agents did not conduct a

wholesale seizure of Mew's records, but left "a large volume" behind. RT 12/16/94 at 137-38.

The district court's finding that Mew's business was "permeated with fraud," thereby justifying an extraordinarily broad seizure of documents, bolsters our conclusion. CR 107 at 6. *See United States v. Offices Known as 50 State Distributing Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983) (broad search for business records is permissible if probable cause exists to believe fraud permeates the entire business operation), *cert. denied*, 465 U.S. 1021 (1984). The affidavit supporting the search warrant validates the lower court's finding, as it is clear therefrom that NPI's central purpose was to serve as a front for defrauding prime bank note investors. Accordingly, we find that the warrant itself was neither overly broad nor insufficiently specific.

The Plain View Doctrine

[18] As to the seizure of material outside the scope of the warrant, the government concedes that its agents seized several documents pre-dating May 1992, but urges that these documents were properly seized under the "plain view" doctrine. Mew argues that, under the plain view doctrine, the incriminating character of the documents must be "'immediately apparent.'" *See Horton v. California*, 496 U.S. 128, 136 (1990) (quoting *Coolidge*, 403 U.S. at 466 (plurality opinion)). The record reveals that the agents had to peruse each document to determine whether it related to other fraudulent activity.

The government maintains that the pre-May 1992 documents pertained to Mew's prior fraudulent activities with IBI and ADR, concerning which they had probable cause. Agent Dana MacDonald, who oversaw the search of Mew's residence, testified that the agents were informed prior to the search concerning previous criminal investigations of IBI and ADR. The government thus suggests that the incriminating nature of these documents was "immediately apparent" to the executing agents, in conformance with *Horton*'s requirements. It appears eighteen such documents were seized and offered into evidence.

We think this is a close question. *See Arizona v. Hicks*, 480 U.S. 321, 326 (1987). Just as the officer in *Hicks* could not, absent probable cause, upon glancing at a stereo, move it and look for a serial number, *id.* at 324-29, it may be argued that neither may an officer, upon glancing at a document noticeably beyond a search warrant, peruse it and look for incriminating evidence. As the D.C. Circuit observed in *United States v. Heldt*, a pre-*Hicks* case:

> The incriminating character limitation necessarily permits a brief perusal of documents in plain view in order to determine whether probable cause exists for their seizure under the warrant. If in the course of that perusal, their otherwise incriminating character becomes obvious, they may be seized. *Otherwise, the perusal must cease at the point at which the warrant's inapplicability to each document is clear.*

668 F.2d 1238, 1267 (D.C. Cir. 1981) (per curiam) (internal citations and parenthetical quotations omitted) (emphasis added), *cert. denied*, 456 U.S. 926 (1982).

This is not a case in which the officers merely perused the documents to determine whether they fell within the scope of the search as specified by the search warrant; their immediate observation of the contested documents revealed that the documents fell outside the warrant. The government concedes the agents had to use their own discretion in perusing these papers to determine whether they were incriminating. As the Supreme Court observed in *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976):

> [T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. ... [R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

This court, in *United States v. Issacs*, 708 F.2d 1365 (9th Cir.), *cert. denied*, 464 U.S. 852 (1983), upheld an officer's perusal of a ledger "in no more thorough a manner than necessary to determine whether it contained the items which were the object of the search warrant," *id.* at 1369, stating in summary:

> These cases make clear that when conditions justify an agent in examining a ledger, notebook, journal, or similar item, he or she may briefly peruse writing contained therein. The justification

> may arise from a reasonable suspicion to believe that the discovered item is evidence...; or it may arise from the authority conferred by a warrant to search for certain items which might reasonably be expected to be found within such a book, as here. In either case, the plain view doctrine would permit brief perusal of the book's contents and, consequently, its seizure if such perusal gives the examining agent probable cause to believe that the book constitutes evidence.
>
> We do not mean to suggest that agents entitled to examine a book or similar item may minutely scrutinize its contents, especially when personal, nonbusiness papers are involved. But this case does not require us to explore the limits to brief perusal. The trial court's factual findings establish that no more than a glance was necessary to ascertain the incriminating nature of the notations.

Id. at 1370 (internal citations and quotations omitted).

In the present case, we are troubled by the fact that, although the warrant limited the search to records post-dating May 1992 and pertaining to the Unity House fraud, the agents nonetheless seized documents beyond the scope of the warrant. it would have been readily apparent to the government agents that the documents seized pre-dated May 1992. In examining these documents, therefore, the agents were immediately alerted to the fact that the documents were beyond the warrant's scope. More difficult is the question of whether these documents were on their face incriminatory. *Compare United States v. Menon*, 24 F.3d 550, 559-61 (3d Cir. 1994) (upholding plain view seizure of documents beyond warrant where seizing agents' collective knowledge gave them probable cause to believe trigger words such as "Jabeco," the name of a company with which defendant allegedly engaged in criminal activity, and "reprocessing" indicated that the documents evidenced illegal activity), *with United States v. Soussi*, 29 F.3d 565, 572 (10 Cir. 1994) (permitting cursory review of documents pre-dating warrant by ten months, but remanding for factual finding to determine whether the incriminating character of the documents was "immediately apparent during the cursory review"); and *United States v. Hinckley*, 672 F.2d 115, 132 (D.C. Cir. 1982) (per curiam) (rejecting argument that officer's observation, during lawful search for contraband, of piece of paper containing trigger words "prison," "life sentence," and "cooperation with the Justice Department," justified reading the entire document), *overruled in part on other grounds*, *Hudson v. Palmer*, 468 U.S. 517 (1984).

[19] We assume *arguendo* that the searches for and seizures of these eighteen documents were not justified by the plain view doctrine, and therefore that they were illegally seized. This evidence was only material, however, to the testimony of Norman Frank and Brian Ajifu, as it pertained to Mew's prior fraudulent schemes. As we have held that this evidence was properly received under Fed. R. Evid. 404(b), we also note that the trial involving all of the defendants lasted for over one month. The other documentary and testimonial evidence pertaining to the Unity House fraud, including that implicating Mew, was overwhelming. The evidence pertaining to Mew's prior involvement with IBI, ADR, Norman Frank, and Brian Ajifu was *de minimis* in comparison to the evidence directly relevant to the particular offenses for which the defendants were tried.

[20] We therefore find, even assuming that Mew's Fourth Amendment rights were violated, that the evidence admitted as a result of the illegal search was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 24 (1967).[13]

CONCLUSION

The judgment of conviction of each of the defendants and the sentencing of the district court are AFFIRMED.

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[13] In *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993), the Supreme Court for the first time rejected the harmless error rule of *Chapman v. California,* 386 U.S. 18, 24 (1967), in collateral attack cases involving constitutional trial error. The *Brecht* Court held that, where there is constitutional trial error, the petitioner must show actual prejudice under the "'substantial and injurious effect'" rule in order to obtain a reversal. 507 U.S. at 637 (quoting *Kotteakos v. United States,* 328 U.S. 760, 776 (1946)). In other words, the petitioner may no longer succeed by showing a mere reasonable possibility of prejudice. *Id.* Until *Brecht* was decided, however, the Court had regularly applied the *Chapman* rule to constitutional trial error in collateral attack cases. *See, e.g., Rose v. Clark,* 478 U.S. 570, 576-77 (1986); *Chambers v. Maroney,* 399 U.S. 42, 52-53 (1970). The standard applied in the latter cases now appears to be overruled by the *Brecht* decision. Until the *Brecht* decision, the *Kotteakos* standard, grounded in the federal harmless error rule under 28 U.S.C. § 2111, had been limited to trial error of non-constitutional questions. Although there is language in the *Brecht* case, *see* 507 U.S. at 631 n.7, which indicates that § 2111 is more amenable to the harmless error review of constitutional violations, we know of no case which substitutes the *Brecht* rule of actual prejudice for the less stringent rule of *Chapman* on direct appeal.

APPENDIX C

Judge Burgess

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, Defendants.	)	No. CR94-5246FDB SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNTS I THROUGH V

A. INTRODUCTION

1. At all relevant times, ADR HOLDINGS AND INVESTMENTS LIMITED ("ADR") was an organization incorporated in the State of Nevada. At various times ADR was referred to as ADR HOLDINGS AND TRUST, and ADR TRUST. For portions of time on which this Superseding Indictment is

focused, ADR operated in Las Vegas, Nevada; Tacoma, Washington; and Honolulu, Hawaii.

2. At all relevant times, North Pacific Investments, Inc. (hereinafter sometimes referred to as "NPI"), was an organization incorporated in the State of Washington. For a portion of the time on which this Superseding Indictment is focused, NPI maintained an office in Gig Harbor, Washington.

3. At all relevant times, MORREON B. RUDE was the president, treasurer, and a director of NPI. MORREON B. RUDE owned fifty percent (50%) of the stock of NPI.

4. At all relevant times, STAFFORD Y.L. MEW was the president of ADR and the vice-president and a director of NPI. The remaining fifty percent (50%) of the stock of NPI is owned by the wife of STAFFORD Y.L. MEW. She is also listed as the secretary and a director of NPI.

5. At all relevant times, RODNEY H.S. KIM was an attorney admitted to practice law in the State of Hawaii. On various occasions during the period of time on which this Superseding Indictment is focused, RODNEY H.S. KIM was described as the attorney for ADR and NPI. On other occasions, he was described as a partner in NPI.

6. At all relevant times, JACK M.K. GONZALES was an attorney admitted to practice law in the State of Hawaii. JACK M.K. GONZALES acted as a "finder" or promoter for investments through ADR and North pacific Investments, Inc. On some

occasions, JACK M.K. GONZALES described himself as a partner in North Pacific Investments, Inc.

7. At all relevant times, CHARLES E. ANDREWS was the president and owner of Andrews & Associates, a commodities brokerage firm, located in Chicago, Illinois. Since at least 1988, CHARLES E. ANDREWS has assisted ADR and NPI in transactions involving the purchase and sale of "bank paper," including prime bank debt obligations, prime bank instruments, prime bank notes, and standby letters of credit. This assistance included: (a) vouching for STAFFORD MEW, ADR, and NPI's ability to complete these transactions; (b) assuring prospective investors and borrowers that the "bank paper" would be provided; (c) causing a foreign bank account to be established for NPI; and (d) agreeing to negotiate and purchase prime bank instruments on behalf of NPI.

8. At all relevant times, Unity House, Inc. ("Unity House"), was a nonprofit organization incorporated in the State of Hawaii. Unity House provides various benefits, activities, and programs for its beneficiaries, who are the current and retired members of Local 5 of the Hotel Employees and restaurant Employees Union ("HERE") and Local 996 and Local 681 of the Teamsters Union.

B. ESSENCE OF THE SCHEME AND ARTIFICE TO DEFRAUD

9. Beginning at a date uncertain but in approximately May 1992, and continuing to at least November 4, 1993, in the Western District of Washington, the District of Hawaii, and elsewhere,

STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS devised a scheme and artifice to defraud investors, including Unity House, and for obtaining money and property from investors, including Unity House, by means of false and fraudulent pretenses, representations, and promises (hereinafter the "scheme and artifice to defraud").

10. The essence of this scheme and artifice to defraud was that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS solicited investments from individuals and organizations by promising potential investors that they could earn substantial profits on their investments in "bank paper," which included the purchase and sale of a prime bank debt obligations, prime bank instruments, and standby letters of credit (hereinafter "prime bank notes").

11. In truth and fact, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS were conducting a "Ponzi" scheme in which a portion of the invested funds from some investors were used to pay the promised returns and interest of these and other investors, thereby decreasing the principal amount of the investments. Additional portions of the invested funds were used for their own personal benefit.

C. THE SCHEME AND ARTIFICE TO DEFRAUD

12. It was a part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS solicited and caused to be solicited investors, including Unity House, to invest funds by means of false and fraudulent pretenses, representations, and promises, including the following:

a. A minimum investment, usually Ten Million Dollars ($10,000,000), was required.

b. Invested funds would earn a return of two to five percent per month, or a fraction of a point or percentage of the prime bank note transaction.

c. STAFFORD Y.L. MEW, RODNEY H.S. KIM, JACK M.K. GONZALES, and CHARLES E. ANDREWS had successfully invested in "bank paper" for several years.

d. The invested funds would be deposited into a bank account. In most cases it was represented that the funds would be deposited into a European prime bank. The funds would remain in the account and only the investor would be able to transfer the funds from this account.

e. A letter of credit would be issued by the prime bank against the funds on deposit in this account. This letter of credit would have a one-year term and could not be drawn against until the completion of this term.

f. Invested funds were entirely safe because the investor could cancel the letter of credit at any time, with thirty (30) days written notice unless a prime bank note transaction was in progress, and, in the event of cancellation, ADR or NPI would have to return the funds to the investor.

g. The letter of credit would then be used to purchase "financial instruments from the world's top 100 banks," "discounted international paper," "prime bank debt obligations," or "prime bank notes." These prime bank notes would be purchased at a discounted rate and subsequently sold at a higher rate.

h. Several prime bank note transactions could be completed in a one year period.

i. STAFFORD Y.L. MEW, RODNEY H.S. KIM, CHARLES E. ANDREWS, and Northern Pacific Investments, Inc., were highly experienced in completing prime bank note transactions.

j. Such prime bank note transactions or "tranchings" would be completed in 30 to 45 days and would involve prime bank notes of an aggregate value of Two Hundred Fifty Million Dollars ($250,000,000).

k. STAFFORD Y.L. MEW, RODNEY H.S. KIM, and JACK M.K. GONZALES had successfully engaged in prime bank note and related transactions for several years.

l. NPI had an untarnished reputation in its dealings with investors.

13. It was a further part of the scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North Pacific

Investments, Inc., promoted and caused to be promoted the prime bank note program through "finders," who were paid substantial commissions for finding investors.

14. It was a further part of the scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North Pacific Investments, Inc., attempted, on occasion, to receive and disburse invested funds and the return on invested funds in currency; thereby making it more difficult to trace these financial transactions.

15. It was a part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS received and caused to be received invested funds that were supposedly to be used to purchase performance bonds, in conjunction with prime bank note transactions.

16. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North pacific Investments, Inc., used portions of the invested funds to pay the promised return of five percent (5%) per month to investors; thereby perpetuating the scheme and artifice to defraud by creating the appearance the investments generated the promised return.

17. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E.

ANDREWS used portions of the invested funds for travel, entertainment, commissions and finders fees, and expenses incurred for their personal benefit.

18. Acting in reliance on the pretenses, representations, and promises set forth in paragraph 12 above, Unity House agreed to invest Ten Million Dollars ($10,000,000) in this prime bank note program. In truth and fact, no such prime bank note program existed; STAFFORD Y.L. MEW, RODNEY H.S. KIM, CHARLES E. ANDREWS and North Pacific Investments, Inc., had no experience in completing prime bank note transactions; primarily through the efforts of CHARLES E. ANDREWS a bank account in the name of Unity House was opened at Credit Suisse in Geneva, Switzerland; STAFFORD Y.L. MEW arranged to have signature authority with respect to the Unity House account at Credit Suisse; and all of the invested funds were transferred out of the Unity House account without the knowledge and authorization of the officers of Unity House.

19. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and North Pacific Investments, Inc., caused an account to be opened in Unity House's name at Credit Suisse, Geneva, Switzerland. Thereafter, Ten Million Dollars ($10,000,000) was transferred from Unity House's account at Bank of America, Honolulu, Hawaii, and deposited to this account.

20. it was a further part of this scheme and artifice that CHARLES E. ANDREWS on behalf of Andrews & Associates agreed to negotiate and purchase prime bank instruments on behalf of NPI, even though CHARLES E. ANDREWS had never previously purchased any prime bank instruments.

21. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and North Pacific Investments, Inc., caused Unity House's officers to sign a Private Participation Agreement, which repeated many of the false and fraudulent pretenses, representations, and promises which are set forth in paragraph 12 above, and a Limited Power of Attorney, which purportedly gave North pacific Investments, Inc., limited authority to act with respect to the invested funds. Neither the Private Participation Agreement nor the Limited Power of Attorney authorized any portion of the invested funds to be transferred from Unity House's account at Credit Suisse to any account under the control of North Pacific Investments, Inc.

22. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and North Pacific Investments, Inc., caused Unity House's officers to extend a signature authority for Unity House's account at Credit Suisse to STAFFORD Y.L. MEW with the understanding that this signature authority was required only to facilitate the issuance of

the letter of credit and the transfer of the invested funds and the return from the invested funds to Unity House.

23. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and North Pacific Investments, Inc., caused all of the invested funds to be transferred by wire communication from Unity House's account at Credit Suisse to an account at Seafirst Bank, Seattle, Washington, which was in the name of North Pacific Investments, Inc.

24. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and Northern pacific Investments, Inc., caused a large portion of the invested funds to be transferred from the bank account in the name of North pacific Investments, Inc., to a number of stock and commodities brokerage accounts. Thereafter, much of these invested funds were lost in stock and commodities trading conducted by and for STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North pacific Investments, Inc.

25. In addition, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North pacific Investments, Inc., used other funds from these stock and brokerage accounts for various travel, entertainment, and other expenses incurred for their personal benefit.

26. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North pacific Investments, Inc., caused additional funds to be transferred from the bank account in the name of North pacific Investment, Inc., to pay for various travel, entertainment, and other expenses incurred for their personal benefit.

27. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and North Pacific Investments, Inc., tendered and caused to be tendered to Unity House's officers various excuses for the delay in completing the first prime bank note transaction with the invested funds. In truth and fact, all of these excuses were false and fraudulent and the invested funds had been, or were being, transferred from Unity House's account at Credit Suisse to an account in the name of North Pacific Investments, Inc.

28. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, CHARLES E. ANDREWS, and North pacific Investments, Inc., caused to be transferred to an account at First Hawaiian Bank in the name of Unity House, Six Hundred Fifty Thousand Dollars ($650, 000), which was represented to be the return from the first prime bank note transaction or tranching, i.e., Six Hundred Twenty Thousand Dollars ($620,000), and an additional Thirty Thousand Dollars

($30,000) because of the delay in completing the first transaction. In truth and fact, no prime bank note transaction or tranching was ever completed and the purported return was portion of the invested funds transferred to Unity House's account to lull Unity House's officers.

29. It was a further part of this scheme and artifice to defraud that STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and North pacific Investments, Inc., prepared and caused to be prepared false minutes of meetings of the board of directors of North pacific Investments, Inc., and other false and fraudulent documents. In part, these minutes and other documents are false and fraudulent because the investments of Unity House and others are characterized as loans when in truth and fact they had been characterized to investors as investments in a prime bank note program.

D. EXECUTION OF THE SCHEME AND ARTIFICE TO DEFRAUD.

30. On or about the dates set forth below, at Seattle, within the Western District of Washington, and elsewhere, for the purpose of executing this scheme and artifice to defraud investors, including Unity House, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, willfully and knowingly caused to be transferred by wire

communication in interstate and foreign commerce from Unity House's account at credit Suisse, Geneva, Switzerland, to an account in the name of North pacific Investments, Inc., at Seafirst Bank, Seattle, Washington, writings, signs, signals, pictures, and sound, that is, the wire transfers hereinafter described, each of which constitutes a separate count of this Superseding Indictment.

COUNT	DATE	AMOUNT
I	02/17/93	$1,000,000
II	03/18/93	$1,000,000
III	04/01/93	$1,000,000
IV	04/23/93	$2,000,000
V	04/29/93	$5,000,000

All in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNTS VI THROUGH X

On or about the dates set forth below, at Seattle within the Western District of Washington, and elsewhere, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, with the intent to promote the carrying on of a specified unlawful activity, to wit, a scheme to commit wire fraud as proscribed in Title 18, United States Code, Section 1343, and as more specifically described in Counts I through V of this Superseding Indictment, did transfer funds from a place outside the United States, that is, Unity House's account at Credit Suisse, Geneva, Switzerland, to a place in the United States, that is, an account in the name of North

Pacific Investments, Inc., at Seafirst Bank, Seattle, Washington; each such transfer as more particularly described below constituting a separate count of this Superseding Indictment.

COUNT	DATE	AMOUNT
VI	02/17/93	$1,000,000
VII	03/18/93	$1,000,000
VIII	04/01/93	$1,000,000
IX	04/23/93	$2,000,000
X	04/29/93	$5,000,000

All in violation of Title 18, United States Code, Section 1956(a)(2)(A) and Section 2.

CRIMINAL FORFEITURE

The Grand Jury further alleges that, pursuant to Title 18, United States Code, section 982, as a result of the offense stated above, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS shall each forfeit to the United States of America any and all interest in property, real or personal, involved in said offense, and any property traceable to said property, said property to include, but not be limited to the following:

a. A 5.15 carat diamond ring, with a 14 Karat white-gold band and

b. The following Morgan dollars:

(1) 1880-O, MS-65, No. 5389106;

(2) 1880-O, MS-65, No. 6934519;

(3) 1883-S, MS65-DMPL, No. 8002001;

(4) 1887-O, MS 65DMPL, No. 7085909;
(5) 1903, MS-65DMPL, No. 5595005; and
(6) 1904, MS-65, No. 7328203.

In the event that the above-described property, as a result of any act or omission of any of the defendants, cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond the jurisdiction of the Court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty, it is the intent of the United States of America to seek the forfeiture of any other property of the defendants up to the value of above-described property, pursuant to Title 21, United States Code, Section 853(p), made applicable to this offense by Title 18, United States Code, Section 982(b)(1)(A).

All in violation of Title 18, United States Code, Section 982.

COUNT XI

On or about July 6, 1993, at Gig Harbor, within the Western District of Washington, and elsewhere, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, knowing that the property involved in a financial transaction, that is Six Hundred Fifty Thousand Dollars ($650,000), represents the proceeds of the scheme to commit wire fraud as proscribed in Title 18, United States Code, Section 1343, and as more specifically described in Counts I through V of this Superseding Indictment, a form of specified unlawful activity, did conduct and cause to be conducted a financial transaction, to wit, the transfer by wire communication affecting interstate commerce of the Six Hundred Fifty Thousand Dollars from an account in the name of North pacific Investments, Inc., at Seafirst Bank, Gig Harbor, Washington, to an account in the name of Unity House, at First Hawaiian Bank, Honolulu, Hawaii, with the intent to promote the carrying on of the scheme to commit wire fraud. This transfer of funds was falsely and fraudulently represented to constitute a return on an investment by Unity House resulting from a prime bank note transaction or "tranching." This transfer of funds was intended to lull Unity House officials to believe that their investment of Ten Million Dollars ($10,000,000) in prime bank note transactions through North pacific Investments, Inc., was ongoing and successful.

All in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i) and Section 2.

COUNT XII

A. THE AGREEMENT

Beginning at a date uncertain in approximately May 1992 and continuing to at least November 4, 1993, at Gig harbor, within the Western District of Washington, the District of Hawaii, and elsewhere, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree among themselves and each other, to commit offenses, in violation of the laws of the United

States, to wit: wire fraud, in violation of Title 18, United States Code, Section 1343 and Section 2, and money laundering in violation of Title 18, United States Code, Section 1956(a)(2)(A) and (a)(1)(A)(i) and Section 2.

B. THE PURPOSE OF THE AGREEMENT

STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, agreed to conduct the fraudulent scheme that is described in Counts I through V of this Superseding Indictment to induce individual and business investors, including Unity House, to invest money, which they would use for various entertainment, travel, and other expenses incurred for their personal benefit, including trading in the stock and commodities markets; to create the appearance that such investments were successful by using invested funds to pay purported returns on the invested funds; and, to conceal the true nature of this scheme by preparing false documents relating to the invested funds.

C. THE MANNER AND MEANS BY WHICH THE AGREEMENT WAS TO BE EXECUTED.

This fraudulent scheme was to be executed in the manner and through the means set forth in Counts I through V of this Superseding Indictment.

D. OVERT ACTS IN FURTHERANCE OF THIS AGREEMENT.

For the purpose of furthering this agreement and to effect the objects thereof, STAFFORD Y.L. MEW, RODNEY H.S. KIM, MORREON B. RUDE, JACK M.K. GONZALES, and CHARLES E. ANDREWS, committed numerous overt acts including the acts set forth below, in the Western District of Washington, The District of Hawaii, and elsewhere.

1. On or about July 7, 1992, RODNEY H.S. KIM met with others, including representatives of the Office of Hawaiian Affairs, and promoted the prime bank note program.

2. On or about August 5, 1992, RODNEY H.S. KIM forwarded a letter containing false and fraudulent pretenses, representations, and promises to an investment finder.

3. On or about August 12, 1992, JACK M.K. GONZALES signed an affidavit containing false and fraudulent pretenses, representations, and promises.

4. On or about September 10, 1992, an investment finder traveled to Japan for the purpose of promoting the prime bank note program offered by ADR Trust.

5-9. On or about the dates set forth in Counts I through V of this Superseding Indictment, STAFFORD Y.L. MEW forwarded letters to Credit Suisse, Geneva, Switzerland, directing the bank to transfer by wire communication the specified amounts.

10. On or about December 15, 1992, JACK M.K. GONZALES forwarded a letter containing false and fraudulent pretenses, representations, and promises to a Unity House official.

11. On or about December 1992, RODNEY H.S. KIM wrote a memorandum to the office of James tam, an attorney that had been retained by Unity House to provide a professional

opinion with respect to a prime bank note program offered by North Pacific Investments, Inc., making certain suggestions for changes to the opinion letter that had been drafted.

12. On or about January 8, 1993, STAFFORD Y.L. MEW and RODNEY H.S. KIM met with others, including representatives of Unity House, and Promoted the prime bank note program.

13. On or about January 1993, RODNEY H.S. KIM prepared a Private participation Agreement and a Limited Power of Attorney for use by Unity House in setting forth the understanding of Unity House as to the terms of the investment.

14. On or about January 1993, STAFFORD Y.L. MEW and CHARLES E. ANDREWS traveled to Geneva, Switzerland and caused to be opened a bank account in the name of Unity House at Credit Suisse.

15. On or about January 26, 1993, CHARLES E. ANDREWS on behalf of Andrews & Associates and STAFFORD Y.L. MEW on behalf of NPI entered into an agreement pursuant to which Andrews & Associates agreed to negotiate and purchase prime bank instruments on behalf of North Pacific Investment, and NPI agreed to fund these transactions.

16. From about February 1993 through June 1993, RODNEY H.S. KIM repeatedly represented to Unity House officials that one prime bank note transaction or "tranching" was being completed or had been completed by North Pacific Investments, Inc., with the funds invested by Unity House.

17. On or about April 18, 1993, North Pacific Investments opened a speculative options trading account at First Commercial Financial Group, Inc., in Chicago. CHARLES E. ANDREWS was given discretionary authority to trade all funds invested into this account.

18. Between on or about April 23, 1993 and July 6, 1993, MORREON B. RUDE caused the transfer by wire communication of Three Million Dollars from a bank account in the name of NPI to a brokerage account in the name of NPI at First Commercial Financial. CHARLES E. ANDREWS traded the funds in the NPI brokerage account and generated approximately $649,000 in commissions.

19. On or about July 6, 1993, MORREON B. RUDE caused the transfer by wire communication of Six Hundred Fifty Thousand Dollars ($650,000) from an account in the name of North Pacific Investments, Inc., at Seafirst Bank to an account in the name of Unity House at First Hawaiian Bank.

20. At a date uncertain, but on or before August 25, 1993, MORREON B. RUDE, as president of North Pacific Investments, Inc., prepared minutes of meetings of the board of directors of North Pacific Investments, Inc., which misrepresented as loans the investments in a prime bank note program.

All in violation of Title 18, United States Code, Section 371.

COUNT XIII

1. On or about December 15, 1993, at Seattle, within the Western District of Washington, CHARLES E. ANDREWS,

while under oath and testifying in a proceeding before a Grand Jury of the Untied States, knowingly did make false material declarations, that is to say:

2. The grand jury was conducting an investigation to determine whether the offenses of wire fraud and money laundering, in violation of Title 18, United States code, Section 1343 and Section 1956, had been committed, and to identify the persons who had committed, caused the commission of, and conspired to commit such violations. it was material to the investigation that the grand jury ascertain: (1) the nature of the relationship between CHARLES E. ANDREWS and others, including STAFFORD Y.L. MEW, who were involved in perpetrating a fraudulent scheme purportedly based on the simultaneous purchase and sale of prime bank notes; and (2) the degree of involvement of CHARLES E. ANDREWS in this fraudulent scheme.

3. At the time and place alleged, CHARLES E. ANDREWS, appearing as a witness under oath at a proceeding before the grand jury, knowingly made the following declarations in response to questions with respect to the material matters alleged in paragraph two:

Q. Can you tell the grand Jury when you met Mr. Mew?

A. To the best of my memory, I met him in 1985 or 1986 in Honolulu at a seminar I gave.

. . .

Q. Did you ever meet face-face with Mr. Mew again after that initial meeting in Honolulu?

A. Yes, I met him in Chicago twice and I met him -- one time I was in Las Vegas and I told him I was going to be out there and we talked for an hour or so just briefly.

* * *

4. The testimony of CHARLES E. ANDREWS that since their initial meeting he had met STAFFORD Y.L. MEW face-to-face on only three other occasions--twice in Chicago and once in Las Vegas--was false, as CHARLES E. ANDREWS well knew and believe, in that, in January 1993, CHARLES E. ANDREWS traveled to Geneva, Switzerland; met with STAFFORD Y.L. MEW; assisted STAFFORD Y.L. MEW in opening a bank account at Credit Suisse for the deposit of a $10 million investment by Unity House, Inc., in a fraudulent scheme involving the proposed simultaneous purchase and sale of prime bank notes; and CHARLES E. ANDREWS and STAFFORD Y.L. MEW entered into a written agreement between Andrews & Associates, Inc., and North pacific Investments, Inc., pursuant to which North Pacific Investments, Inc., agreed to provide for the funding of prime bank instruments and Andrews & Associates, Inc., agreed to negotiate and purchase prime bank instruments on behalf of North Pacific Investments, Inc.

All in violation of Title 18, United States Code, Section 1623.

COUNT XIV

1. On or about December 15, 1993, and September 12, 1994, at Seattle, within the Western District of Washington, CHARLES E. ANDREWS, while under oath and testifying in proceedings before a Grand Jury of the Untied States, knowingly did make two material declarations, which are inconsistent to the degree that one of them is necessarily false.

2. The grand jury was conducting an investigation to determine whether the offense of wire fraud and money laundering, in violation of Title 18, United States Code, Section 1343 and Section 1956, had been committed, and to identify the persons who had committed, caused the commission of, and conspired to commit such violations. It was material to the investigation that the grand jury ascertain the substance of discussions between CHARLES E. ANDREWS and others, including STAFFORD Y.L. MEW, regarding their success in completing prime bank note or prime bank instrument transactions.

3. On or about December 15, 1993, CHARLES E. ANDREWS, appearing as a witness under oath at a proceeding before the grand jury, knowingly made the following declarations in response to questions with respect to the material matters alleged in paragraph two:

Q. In your conversations with Mr. Mew, what did Mr. Mew tell you about his experience in European prime bank notes, if he had any?

A. I don't -- I mean, he had an excellent understanding of the market, but to my knowledge, I don't ever remember that he absolutely said he'd done one, but he did have a much -- I mean, much better understanding of the mechanics and of the verbiage. The verbiage, the language -- I'm not a lawyer at all, but they're very simple instruments, and I would show them to banks and they would say, "Yes, absolutely, that's what they say," and he had that knowledge. I mean, he -- I don't know where he learned it, but he did know much better than I had ever found out.

Q. But to the best of your knowledge based on your conversations with Mr. Mew, he never made any mention of having successfully completed any transaction in European prime bank notes?

A. I do not recall him ever making a statement that he had done a transaction.

4. On or about September 12, 1994, CHARLES E. ANDREWS, appearing as a witness under oath at a proceeding before the grand jury, knowingly made the following declarations in response to questions with respect to the material matters alleged in paragraph two:

Q. In your discussions with Stafford Mew, did Mr. Mew tell you that he had completed prime bank instrument transactions?

A. Yes, he told me he had.

Q. On how many occasions?

A. I don't know that. He told me that he'd completed several with ADR in Bank of America and he also told me he was going to Florida in later years and completing some with Omni Commerce in Florida. I don't recall the time.

5. These declarations are inconsistent to the degree that one of them is necessarily false.

All in violation of Title 18, United States Code, Section 1623.

COUNT XV

On or about December 14, 1993, at Seattle within the Western District of Washington, in a matter within the jurisdiction of the Internal Revenue Service, agency of the United States, CHARLES E. ANDREWS, knowingly and willfully falsified, concealed and covered up, by trick, scheme, and device, a material fact, in that, during an interview conducted by a special agent with the Criminal Investigation Division of the Internal Revenue Service, CHARLES E. ANDREWS stated that he had met STAFFORD Y.L. MEW on three occasions, including their initial meeting in Hawaii in 1985 or 1986, a meeting in Chicago in 1987 or 1989, and a meeting in Chicago in 1993, but failed to disclose that in January 1993, he had also met with STAFFORD Y.L. MEW in

Geneva, Switzerland, in conjunction with a purported prime bank instrument investment by Unity House, Inc., through North Pacific Investments, Inc.

All in violation of Title 18, United States Code, Section 1001.

A TRUE BILL:

DATED:

FOREPERSON

KATRINA C. PFLAUMER
United States Attorney

ROBERT H. WESTINGHOUSE
Assistant United States Attorney

CARL BLACKSTONE
Assistant United States Attorney

APPENDIX D

NINTH CIRCUIT
CAUSE NOS. 95-30198, 95-30205, 95-30207

IN THE UNITED STATES COURT OF APPEALS
IN AND FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff/Appellee,

vs.

Morreon B. RUDE, Charles E. ANDREWS, Rodney H.S. KIM,
Defendant-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
DISTRICT COURT CASE NO. CR94-5264 (FDB)
THE HONORABLE FRANKLIN D. BURGESS, PRESIDING

A MOTION FOR HEARING EN BANC, OR IN THE ALTERNATIVE, A MOTION TO RECONSIDER

Wallace M. Rudolph
950 Broadway Plaza
Suite 410
Tacoma, WA 98402
(206) 591-2244

Attorney for Defendant/Appellants

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A HEARING *EN BANC* IS NECESSARY TO RECONCILE INCONSISTENT DECISIONS

The Defendant-Appellant moves this Court to reconsider this case *en banc*, or in the alternative, to reconsider the decision of this Court, because of a misapplication of the wire fraud statute 18 U.S.C. 1343, a failure of proof as to the intent of the fraudulent scheme based on jury instructions that related to the necessary proof for a violation of the wire fraud statute 18 U.S.C. § 1343.

The basis for the Motion to Rehear the case *en banc* is that the decision in this is inconsistent with this Court's decision in United States v. Savage, 67 F.3rd 1435, 1442 (9th Cir 1995) on two issues. First, when the crime of wire fraud is completed, and Second, whether the same predicate act may make up the wire element of wire fraud and the transmission element of money laundering.

The Court in *Savage*, supra, held that the crime of wire fraud was completed when the money came under the effective control of the party committing the fraud, and that the same predicate of wiring the money could not be used to establish both wire fraud and money laundering.

The Court in this case held just the opposite, i.e., that the crime of wire fraud was not completed until the money was transferred from the account in Credit Suisse, which was controlled by Defendant Mew, to the account of North Pacific Investments Inc. in Seattle, Washington. Further, this case held that the act of wiring the money from the Credit Suisse account to the North

Pacific Investments Inc. account was the predicate act of both wire fraud and money laundering. These two cases cannot be reconciled and we ask the Ninth Circuit *en banc* to rehear this case and reconsider this contradiction.

BACKGROUND OF THE CASE

Wire fraud, like mail fraud, requires first an obtaining of money or property by false or fraudulent representations or promises. In the superseding indictment, it alleged that among the misrepresentations were that Stafford Y. L. Mew, Rodney H. S. Kim and Charles Andrews were highly experienced in completing prime bank note transactions. (12 i).

The defendant-appellants admit that the evidence in the record supports those allegations in 12(i)(k) that the defendant-appellants did misrepresent their knowledge and experience with prime bank notes, and their ability to bring transactions relating to prime notes to fruition, and that Unity House, based on the misrepresentations, did transfer to Stafford Mew full authority as agent to use such funds to transact prime bank notes.

When those transactions were completed money had been obtained by false pretenses and the crime was complete. Further, in Jury Instructions 16 and 22, the jury was instructed that they may convict simply by finding that one false statement was made, i.e., that the defendants had experience in prime bank transactions, and, in Instruction 22, that it was necessary to prove anyone lost money from these false statements. Thus, the crime of obtaining money by false pretense was complete. The only element missing for a completed crime under 18 U.S.C. § 1343 is the allegation that wire was used to accomplish the fraud so as to give federal jurisdiction.

In order to support a wire fraud charge the superseding indictment charged a parallel crime in paragraph 11 of the superseding indictment in which it alleged that by implication only that the defendant-appellant never intended to invest the money, but to operate a Ponzi Scheme in which they would pay the amounts promised to investors to induce other investors to send more money and that they would make interim payments for the purpose of lulling the investors into making more payments and not complaining about the investment. However, there were no instructions to the jury that in order to find the defendants guilty, they must find that the intent of the parties from the beginning was to operate a Ponzi Scheme. Further, there was no evidence to support such a theory. The evidence of the government witnesses, Charles Andrews and Jean Pierre Collenot were to the effect that substantial efforts were made to effectuate prime bank transactions but that they failed. (p. 49, Charles Andrews, line 10-12), (Collenot, p. 75, line 1-6).

Faced with the failure to complete a prime bank transaction, Stafford Mew had to decide what to do with the ten million dollars. He could return money or convert the money to another purpose not authorized by the agreement between Stafford Mew and Unity House. Stafford Mew's decision was not to return the money to Unity House, but he instead transferred the money to a trading account in commodities. This transfer was a conversion of the money and thus, an embezzlement.

In Section 1, Embezzlement 29 C.J.S., p. 2, it states:

> "Embezzlement is broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come,"

This Section goes on to say on page 3:

> "Embezzlement differs from swindling or obtaining money by false pretenses in that in embezzlement the property is fraudulently appropriated by the person to whom it was entrusted, whereas in swindling the property is wrongfully acquired in the first instance by means of some false pretense or device."

Lastly, the offense was defined in Section 5 as follows:

> "To make out a case of embezzlement under the statutes it is generally necessary to show: (1) That the thing converted or appropriated is of such a character as to be within the protection of the statute. (2) That it belonged to the master or principal, or someone other than accused. (3) That it was in the possession of the accused at the time of the conversion, so that no trespass was committed in taking it. (4) That accused occupied the designated fiduciary relation, and that the property came into his possession and was held by him by virtue of his employment or office. (5) That his dealing with the property constituted a conversion or appropriation of the same. (6) That there was a fraudulent intent to deprive the owner

> of his property. These elements of the offense are dealt with specifically in §§ 6-12 infra.

The evidence in this case fully supports these elements. First, the element converted was the property of Unity House in a bank account in Credit Suisse. Second, no one disputes that the money in the account belongs to Unity House. Third, Anthony Rutledge, the president of Unity House, and Mew signed a limited power of attorney and a private participation agreement allowing Stafford Mew to transfer funds out of the account (p. 2, the Court Opinion). Fourth, Because of the granting of the Power of Attorney to Stafford Mew, he occupied a fiduciary duty toward Unity House. Fifth, The transfer of the property to a trading account instead of the use of the money to buy prime bank notes constituted a conversion of the property, and, Sixth, the transfer of the property to a North Pacific trading account was a fraudulent act for the purpose of denying the lawful owner the use of his property.

Thus, the evidence at the trial established that the false statements concerning the experiences of Mew led to the obtaining of a transfer of 10 million dollars from a Unity House Account in Hawaii to an account under the control of Mew in Switzerland. At that point the crime of obtaining money by false pretenses was complete. The evidence at the trial further established that the money was embezzled and that the payment of $650,000 to Unity House and the making of false financial statements concerning Unity House was to coverup the embezzlement, and not the crime of obtaining money by false pretenses.

WHAT CRIMES WERE COMMITTED?

The first crime charged was a violation of 18 U.S.C. § 1343. There was evidence to support all the elements of the crime but one, as explained in Instruction 16. The one element missing was the use of interstate of foreign wire. Otherwise, the crime was complete when all of the elements of 18 U.S.C. §·1343, as described in Instruction 16, were completed, and all of the facts alleged in paragraph 21 and 22 of the superseding indictment occurred.

Paragraphs 23 through 29 of the superseding indictment alleged not a case of wire fraud but a case of embezzlement. In fact, there was no evidence to support that any of the facts alleged in that part of the indictment were part of the original representations relating to obtaining the funds or were part of the scheme or artifice to defraud. Thus, the only crimes were a state crime of obtaining property by false pretenses, and a federal or state crime of embezzlement from a employee pension fund.

ERRORS IN COURT OPINION

The basic error of the Court is in its conclusion that the transfers from Credit Suisse to SeaFirst was

> "incident to an essential part of the scheme" or "a step in [the] plot." and later "Regarding the transfers from Credit Suisse account to SeaFirst, the defendants overlook the fact that the fraud was not complete until the $10 million deposited in Credit Suisse (in Unity House's account) was within their complete control.

> ... the final steps did not occur until defendants effected the transfers to and from the SeaFirst account.

These statements by the Court are essential to the decision to uphold the conviction and are clearly based on the supposition contrary to the evidence and instructions that the crime of obtaining property by false pretenses was completed when Stafford Mew obtained his power of attorney and the participation agreement and that subsequent to that time he embezzled the money by effecting the transfer contrary to his fiduciary and the participation agreement. The analytic fallacy of the Court opinion is that it assumed the acts that made up the embezzlement were part of the original scheme. As we have pointed out, there is not one scintilla of evidence to support that proposition and the only evidence is that Stafford Mew and Charles Andrew did believe and attempt to complete transactions involving Prime Bank Notes and it was only in the failure to accomplish that end did Stafford mew convert the money in the account to another purpose and use than is charged in the indictment.

The Court goes on to quote United States v. Sindona, 636 F.2d 792, 809 (2d Cir 1980) to the effect that:

> "A scheme to defraud is not complete until the proceeds have been received and the use of the mails or wires to obtain the proceeds satisfies the jurisdictional amount".

This statement is clearly contrary to the instructions given to the jury in instruction 16 and 22 which do not require that any proceeds change hands. Further, the above statement relates to a particular crime. In Pereira v. United States, 347 U.S. 1-7-9, 75 S.Ct. 358, 362-363, 98 L.Ed. 435, 444, the case depended upon by *Sindona* court *supra*, the Supreme Court merely said that when collecting the proceeds was part of the scheme to defraud, the mailing of the check was an incident of the fraud.

In this case, the fraud was complete in depositing the money in Credit Suisse. The Government could have, but did not, charge the use of wire to send the money from the Unity House account to Credit Suisse. The subsequent transfer of the funds was not [emphasis supplied] part of the scheme to defraud, but a clear subsequent decision and thus a separate and different crime.

Based on this analysis, the conviction for wire fraud must be reversed. Because the jurisdictional element of the crime, i.e., the transfer of the money from the Unity House Account at Bank America in Honolulu, Hawaii to Credit Suisse in Geneva Switzerland was not alleged as part of the crime.

In fact, the crime of obtaining money by false pretenses was complete at the time when the money was received at Credit Suisse and all of the acts set out in paragraphs 21 and 22 of the superseding indictment had occurred.

Even if one would contend, contrary to the state of the law and Instruction 22 given in this case, that the crime was not complete until the money put in a North Pacific account such an act occurred previous to the transfer of the funds from Credit Suisse to SeaFirst as alleged in paragraph 23 of the superseding indictment. The undisputed evidence is that the money was transferred from the Credit Suisse account to the Anker Bank in North Pacific's name (Andrews p. 47, 48 line 24; 25, 1), (Collenot, p. 75, line 1-6) and then returned to the Credit Suisse Account prior to the transfer to SeaFirst in Seattle.

Thus, under any theory, the crime of obtaining money by false pretenses was completed prior to the wire transfer of the money to SeaFirst from Credit Suisse.

Under these facts as presented at the trial the wire transfer alleged to be the predicate for the conviction occurred after the crime had been completed.

UNITED STATES V. SAVAGE CANNOT BE RECONCILED WITH UNITED STATES V. RUDE et al.

The position of the Defendant-Appellants is fully supported in this Court's recent decision of United States v. Savage, 67 F.3rd 1435, 1442 (9th Cir 1995). The Court in that case made two determinations that are not reconcilable to the Court's decision in United States v. Rude et al. .

The first decision was that the same wire transfer that supports a wire fraud conviction may not be the predicate for a money laundering conviction. The Court in that case depended on United States v. Johnson, 971 F.2d 562 at 569-570. In this case there is no question that the superseding indictment alleged the same wire transfer as the predicate for both the wire fraud and money laundering charges.

The Second issue decided by the *Savage* court that is contrary to the decision by the Court in this case relates to the completion of the crime. The Court maintained that the crime could not be completed until the money transfer occurred. As we pointed out this conclusion is contrary to Instruction 22 and is clearly contrary to the decision in *Savage,* supra.

In *Savage* the Court at 1443 said:

> "Similarly, the funds transferred in the § 1957 counts where criminally derived property at the time they were deposited in accounts under Savage's control. The funds were clearly at Savage's disposal at the time of the deposit. The record indicates that the parties named on the accounts transferred the money at his request. It is irrelevant the accounts were not in Savage's name."

The analogous situation here is where the money was deposited in Credit Suisse under the control of Stafford Mew. The crime was complete as the deposit and the transfer of control by Unity House was the result of false statements.

It is this inconsistency between United States v. Savage, supra and United States v. Rude et al that requires this circuit to resolve such contrary precedents.

The defendant-appellants recognize that, if they are right that the crime was completed at the time of the deposit of Unity House funds at Credit Suisse in conjunction with the signing of the power of attorney and the participation agreement, that under the *Savage* precedent the subsequent transfer of funds may subject some or all of them to charges of money laundering. However, based on the existing superseding indictment the charges of money laundering as set out in Counts VI through X cannot stand as they are based upon a charge of wire fraud when because (1) of the lack of an appropriate allegation of a wire transfer there is no federal jurisdiction, (2) the only wire transfer alleged is the predicate for the money laundering charge.

At a minimum, the case must be reversed and new appropriate charges filed.

CONCLUSION

This case must be heard *en banc* or be re-heard in light of the decision in United States v. Savage, supra. Under the analysis of the United States v. Savage, supra, the crime of obtaining money by false pretenses was completed at the time the money obtained by false pretenses came under control of Stafford Mew. The evidence is not refuted that the money came under his control when it was deposited into the Credit Suisse account and he had full power of attorney over that money. The indictment is also clear that there was no charge of the use of wire to move that money from Unity House account in BankAmerica to the account at Credit Suisse.

The evidence is equally clear that the original misrepresentation and conspiracy was to obtain such money for the purpose of engaging the purchase of prime bank notes and that at the time the original misrepresentation and conspiracy was formed, no one had the intent to embezzle the money and use the money for a different purpose. Thus, the subsequent embezzlement of the money and subsequent act to cover the embezzlement were a separate and distinct crime and conspiracy.

The purpose of asking for a hearing *en banc* or a rehearing is to ensure that the Court does not issue contradictory precedents and that the appropriate crimes be charged and proved.

DATED: ________________

Respectfully submitted,

____

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